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Aaron J. Saiger
Fordham University School of Law

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OBAMA'S "CZARS" FOR DOMESTIC POLICY AND THE LAW OF THE WHITE HOUSE STAFF

Aaron J. Saiger*

I. "MORE CZARS THAN THE ROMANOV" ¹

Soon after the 2008 presidential election, President-Elect Barack Obama announced that he would simultaneously nominate ex-Senate majority leader Tom Daschle as Secretary of Health and Human Services (HHS) and appoint him to direct the Office of Health Reform, an office to be newly created within the White House. The latter position, notwithstanding its official title, was universally—if colloquially—dubbed health care “czar.”² The czar job, not the Cabinet position, was the big news. It would make Daschle, the *Washington Post* breathlessly reported, “the first Cabinet secretary in decades to have an office in the West Wing.”³

Obama also named Lisa Jackson, who had earlier worked for the Enforcement Division of the U.S. Environmental Protection Agency (EPA) and then became New Jersey Commissioner of Environmental Protection, to be the Administrator of the EPA. He simultaneously appointed Carol Browner, who had served as EPA Administrator in the Clinton Administration and was more senior, more experienced, and better known

* Professor of Law, Fordham University School of Law. This paper was part of a Symposium, sponsored by the Fordham Law Review, entitled “Presidential Influence over Administrative Action: Recent Developments.” I am grateful to the participants in that symposium for their comments on the paper. I am also grateful for comments I received when I presented a very early draft of this paper at the Fordham Law School Summer 2010 faculty retreat. Robert Lieberman and Sheila Foster were the formal respondents for these presentations, respectively, and I thank them particularly. I also acknowledge with gratitude early conversations about this topic with Matthew Diller, and very helpful comments from James Brudney, Nestor Davidson, Abner Greene, Nicholas Johnson, Olivier Sylvain, and Benjamin Zipursky. Finally, I extend my appreciation to Victor Noskov for research assistance and to the staff of the Fordham Law Library for outstanding support.

1. For this phrase, see *infra* note 8 and accompanying text.

2. See, e.g., Al Kamen, *A Who's Who of Who's Where*, WASH. POST, Jan. 20, 2009, at A23.

3. Michael D. Shear & Ceci Connolly, *Obama Assembles Powerful West Wing*, WASH. POST, Jan. 8, 2009, at A1. Two weeks into the new administration, Daschle withdrew his name from consideration for both positions in a contretemps over non-payment of taxes. See Ceci Connolly, *Administration Is Described as Being at a Loss: 'There Were No Other Names,' Ally Says*, WASH. POST, Feb. 4, 2009, at A9. The new President, in the view of some observers perhaps thrown off his stride, see *id.*, then waited nearly a month to nominate Kansas Governor Kathleen Sebelius to become Health and Human Services (HHS) Secretary and to appoint Nancy-Ann DeParle, a former Tennessee health official, to direct the Office of Health Reform. See Michael A. Fletcher, *Sebelius, DeParle Named to Health-Care Posts*, WASH. POST, Mar. 3, 2009, at A4.

than Jackson, to be director of the newly constituted White House Office of Energy and Climate Change Policy.⁴ Browner would be, again colloquially and again universally, the climate czar. This striking and unusual style of appointment,⁵ where the more experienced and higher-profile policymaker serves as “czar” and the junior in the Cabinet, also characterized the selection of Lawrence Summers as director of the National Economic Council and his protégé Timothy Geithner as Secretary of the Treasury.⁶

President Obama’s “government of many czars”—Nancy-Ann DeParle (who ultimately received the health-care post), Summers, and Browner were among nearly fifty appointees upon whom either the President or the press bestowed the title—stimulated substantial interest immediately.⁷ Newspapers discussed it. Senator John McCain cracked that Obama had “more czars than the Romanovs.”⁸ Senator Joseph Lieberman held a Senate hearing on the topic.⁹ Public interest in the issue then abated somewhat until Republicans took control of the House of Representatives following the 2010 midterm elections. Czars then reemerged as a target of the House leadership.¹⁰ In the new environment, a reorganized White House eliminated the positions of some of its highest profile czars,¹¹ although it continued to deploy czars far more pervasively than any previous administration, to its opponents’ continuing dismay.¹² Then, in April 2011, President Obama acquiesced in short-term budget amendments that prohibited the use of federal funds to pay salaries or expenses

4. David A. Fahrenthold, *Seasoned Regulators To Lead Obama Environment Program*, WASH. POST, Dec. 12, 2008, at A9.

5. On unusualness, see *infra* note 63 and accompanying text.

6. See Peter Baker, *Reshaping White House with a Domestic Focus*, N.Y. TIMES, Dec. 20, 2008, at A13 (Obama’s czar-designates are “people of stature equal to or even greater than the members of his cabinet.”); see also STEVEN RATTNER, OVERHAUL: AN INSIDER’S ACCOUNT OF THE OBAMA ADMINISTRATION’S EMERGENCY RESCUE OF THE AUTO INDUSTRY 71 (2010) (“Tim had been Larry’s protégé throughout the Clinton [A]dministration”).

7. Mark J. Rozell & Mitchel A. Sollenberger, *Congress Should Deal with Unchecked Czars*, ROLL CALL, Feb. 1, 2011, at 14.

8. Steve Holland, *Obama Fashions a Government of Many Czars*, REUTERS, May 29, 2009, available at <http://www.reuters.com/article/2009/05/29/us-obama-czars-analysis-idUSTRE54S5U120090529> (quoting Sen. John McCain). Versions of this gag were already circulating in Washington when McCain picked it up. See, e.g., David A. Fahrenthold, *Czar Talk: An Open Letter to President Obama from Wilhelm II, German Kaiser and King of Prussia*, WASH. POST, May 3, 2009, at B3 (“What do you see in the Romanovs that makes them such models of good government?”).

9. See *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 111th Cong. (2009).

10. See *infra* notes 96–97 and accompanying text.

11. See Jackie Calmes, *With a Change in Top Aides, the West Wing Quiets Down*, N.Y. TIMES, Mar. 4, 2011, at A17 (reporting that the White House was “doing away” with both the health care and climate “czars” in the wake of the appointment of William Daley as chief of staff).

12. See, e.g., Rozell & Sollenberger, *supra* note 7.

associated with four high-profile czar positions that had been eliminated or left vacant in the reorganization.¹³

Strikingly, throughout the creation, expansion, and retrenchment of the Obama czar system, the controversies over czars yielded no definitive conclusions regarding what czars are supposed to do, how they are problematic, or whether they even constitute anything remarkable in the first instance.

To reach such conclusions is not straightforward, even if, as I do in this paper, one restricts oneself to domestic rather than foreign affairs.¹⁴ Czars' portfolios little resemble one another, ranging as they do over vastly different policy domains, political equilibria, and policy agendas. The term "czar" itself, moreover, is routinely used in ways both loose and misleading.¹⁵ A czar's appointment conventionally suggests a President determined to accomplish something difficult, important, and substantive. Therefore the President tasks a powerful, purposeful, and at least somewhat autocratically-minded agent,¹⁶ with access to himself, to accomplish that agenda and ensure that it does not fall prey to interagency squabbling,

13. See Department of Defense and Full-Year Continuing Appropriations Act, H.R. 1473, 112th Cong. § 2262 (2011) (enacted) (defunding czar's offices for health, climate, the automobile industry, and urban affairs).

14. I restrict myself in this way, following other scholars in the field, see Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 598 (1984), because the relationship between the presidency and the bureaucracy has a more substantial legal dimension with respect to domestic policy than it does with respect to foreign and military affairs. Presidents' desire to control bureaucratic activity is as acute in the latter areas as in the former; witness the perennial competition between the Secretaries of State and Defense and the National Security Advisor, see GEORGE C. EDWARDS III & STEPHEN J. WAYNE, *PRESIDENTIAL LEADERSHIP: POLITICS AND POLICY MAKING* 300–04 (1985), and Obama's early appointment of "czars" for Iraq, Afghanistan, and Middle East peacemaking. In foreign and military policy, however, administrative law restrictions are especially weak. Bureaucratic activity relies less upon rulemaking and adjudication, and judicial deference to presidential preferences is at its zenith. See Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305 & n.232 (1988) (citing cases since *Youngstown Sheet & Tube Co. v. Sawyer*, 353 U.S. 579 (1952), that "h[old] for the President . . . with astonishing regularity"). Therefore "czars" in the foreign and military areas raise legal questions distinct from those they raise in domestic policy.

15. *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs*, supra note 9, at 9, 53 (statement of James P. Pfiffner) ("The term 'czar' has no generally accepted definition within the context of American government. It is a term loosely used by journalists to refer to members of a president's administration who seem to be in charge of a particular policy area."); accord *Examining the History and Legality of Executive Branch Czars: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 5–6 (2009) (statement of Bradley H. Patterson, Jr.) (Czar "is a label now used loosely hereabouts, especially by the media.").

16. See Kevin Sholette, Note, *The American Czars*, 20 CORNELL J.L. & PUB. POL'Y 219, 222 (2010) (term "czar" in American politics has "consistently conveyed the idea that the titleholder possesses nearly authoritarian control over his political domain"); cf. MARK TWAIN, *THE INNOCENTS ABROAD* 291 (Penguin Books 2002) ("[T]he Autocrat of Russia[s] . . . lightest word is law to seventy millions of human beings!").

wandering agendas, or bureaucratic inertia.¹⁷ A President might also appoint a czar, however, in order to suggest heroic effort while avoiding substantive accomplishment.¹⁸ Like the stereotypical blue-ribbon presidential commission, a czardom can be an exercise in public relations.¹⁹ Indeed, Potemkin czars are attractive precisely because czardoms otherwise signal presidential seriousness. The term “czar” comfortably

17. See BRADLEY H. PATTERSON, JR., *THE WHITE HOUSE STAFF: INSIDE THE WEST WING AND BEYOND* 263–64 (2000). The term also takes a similar meaning at the subnational level. See, e.g., MARTIN SHEFTER, *POLITICAL CRISIS/FISCAL CRISIS: THE COLLAPSE AND REVIVAL OF NEW YORK CITY* 59 (1985) (1965 appointment of a New York City “housing ‘czar’” by Mayor John Lindsay to be a “single superagency” that would “centralize all housing and redevelopment functions” in the city).

18. See *id.* at 264; see also Ashton B. Carter, *The Architecture of Government in the Face of Terrorism*, *INT’L SECURITY*, Winter 2001–2002, at 5, 12 (“After [a] czar is . . . overridden a few times, lower-level bureaucrats conclude that the czar’s directives can be ignored. As the Washington saying about czars goes, ‘The barons ignore them, and eventually the peasants kill them.’”); Ben Sargent, *Image* (Aug. 17, 2004), <http://www.amureprints.com/Detail.asp?ImageID=92948>.



19. See David J. Barron, *Foreword: From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 *GEO. WASH. L. REV.* 1095, 1122 (2008) (suggesting that commissions do not “play a meaningful role in influencing regulatory policy,” but “merely issue reports and the like”); Amy B. Zegart, *Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions*, 34 *PRESIDENTIAL STUD. Q.* 366, 366–67 (2004) (describing, but also arguing for the atypicality of, “a particular image: a blue ribbon panel of distinguished civilians, appointed directly by the president, that defuses, deflects, or delays presidential action on some controversial domestic issue without producing much in the way of substantive policy change”).

accommodates both purposes: Ben Zimmer of *Slate*, writing as czars accreted early in the Obama Administration, described the word as one that “evokes either old-fashioned despotism or latter-day caricatures of tin-pot tyrants.”²⁰

“Czar” is also deployed to describe a wide range of officialdom. Various lists of executive department czars in Obama’s first term often include, along with presidential advisors like Browner and DeParle in the White House Office, a gallimaufry of line-agency deputy and assistant secretaries.²¹ The latter, unlike the former, are appointed by the President and confirmed by the Senate.²² Also on the lists are officials who serve in subunits of the Executive Office of the President (EOP); although part of the presidential bureaucracy and thus distinct from agencies, these are nevertheless not the personal staffers of the President.²³ Their position and authority are defined by statute, and they must secure Senate confirmation.²⁴ Among the officials in this category are, for example, the federal “drug czar”²⁵ and the head of the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB), sometimes called the “regulatory czar.”²⁶

20. Ben Zimmer, *Czar Wars*, SLATE (Dec. 29, 2008, 11:24 AM), <http://www.slate.com/id/2207055>.

21. See, e.g., *President Obama’s “Czars”*, POLITICO, Sept. 8, 2009, <http://www.politico.com/news/stories/0909/26779.html>; *List of U.S. Executive Branch Czars*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_czars_of_the_Obama_Administration (last visited Apr. 20, 2011).

22. In the 1970s, the term “czar” “normally . . . designated” “departmental officers.” Graham Allison, *An Executive Cabinet*, SOC’Y, Jul.–Aug. 1980, at 41, 46.

23. See Harold C. Relyea, *The Executive Office Concept*, in THE EXECUTIVE OFFICE OF THE PRESIDENT: A HISTORICAL, BIOGRAPHICAL, AND BIBLIOGRAPHICAL GUIDE 3, 25 (Harold C. Relyea ed., 1997).

24. On congressional creation of subunits within the Executive Office of the President, see HAROLD C. RELYEA, CONG. RESEARCH SERV., NO. 98-606 GOV, THE EXECUTIVE OFFICE OF THE PRESIDENT: AN HISTORICAL OVERVIEW I (2008).

25. The formal title of the drug czar is “Director of National Drug Control Policy.” 21 U.S.C. § 1702(b)(1) (2006). The “Office of National Drug Control Policy” (ONDCP) is “established” by statute “in the Executive Office of the President.” *Id.* § 1702(a); see also *id.* § 1703(a)(1) (providing that the Director of ONDCP shall be appointed by the President, “by and with the advice and consent of the Senate,” and removable by the President at will).

26. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 508 (2003). The director-to-be of the new Bureau of Consumer Financial Protection was similarly widely described in the press as the “consumer czar” before anyone was aware of President Obama’s intention to avoid the usual advise-and-consent process by naming Elizabeth Warren as a White House advisor rather than as Director of the agency. See, e.g., Lorraine Woellert, *‘Supreme Court’ Battle Begins Over Consumer Chief*, BLOOMBERG BUSINESSWEEK (July 16, 2010, 3:29 PM), <http://www.businessweek.com/news/2010-07-16/-supreme-court-battle-begins-over-consumer-chief.html>; see Brady Dennis, *Warren Expected To Be Adviser*, WASH. POST, Sept. 16, 2010, at A18; Damian Paletta, *Consumer-Czar Candidate Waits in Wings*, WALL ST. J., Aug. 2, 2010, at A4. The Bureau is defined by law as “an Executive agency” whose Director is subject to Senate advice and consent. Dodd-Frank Wall Street Reform and Consumer Protection Act § 1011, Pub. L. No. 111-203, 124 Stat. 1376 (codified at 12 U.S.C.A. § 5491 (2010)).

Conversely, many Washington officials have responsibilities that would allow them plausibly to be called a “czar,” but nobody ever does.²⁷ In short, whether an official is called a “czar” tells you as much about her formal organizational position as whether she works for a “department,” “agency,” or an “administration,” which is to say, nothing.²⁸

To the extent that Obama’s czars are of substantive interest, however, it is because they are powerful, engaged in policy and not merely in public relations. And if they are of legal interest, it is because the sort of policymaking they do occurs outside of the ordinary, Administrative Procedure Act (APA)-delimited structure of agencies. I do not derogate the possibility that some czars are figureheads, and no one can doubt that President Obama, like all Presidents, often seeks to accomplish important substantive policy objectives using the agency form.²⁹ Nevertheless, it seems clear that at least some of Obama’s czars were tasked to bring about particular and significant policy change, and to do so from the White House

27. See Randy James, *A Brief History of White House Czars*, TIME (Sept. 23, 2009), <http://www.time.com/time/politics/article/0,8599,1925564,00.html> (suggesting that the term is a “media creation” applied as a “snappy shorthand” for “unwieldy official titles . . . begging for a rebranding”).

28. The taxonomy in these paragraphs is incomplete, and probably necessarily so. Consider the case of “car czar” Steve Rattner, appointed in 2009 to direct the task force that would plot the fate of the teetering auto industry. Rattner’s committee was to be supervised, not by the President, but jointly by Treasury Secretary Timothy Geithner and Lawrence Summers, the latter himself a “czar.” The Obama Administration, moreover, let it be known that this structure was intended as an explicit repudiation of the previous administration’s plan to appoint a “car czar.” Nevertheless, references to Rattner as “car czar” were ubiquitous during and after his appointment. See RATTNER, *supra* note 6, at 32, 46, 64; Brady Dennis, *Treasury’s Auto Adviser Led Other Rescues*, WASH. POST, Feb. 18, 2009, at D1; Jim Rutenberg, Peter Baker & Bill Vlasic, *Early Resolve: Obama Stand in Auto Crisis*, N.Y. TIMES, Apr. 29, 2009, at A1; Peter Whoriskey & Brady Dennis, *UAW, Ford Cut Deal on Health Benefits*, WASH. POST, Feb. 24, 2009, at D1. For examples of post-appointment applications of the term to Rattner, see Francesco Guerrera, Justin Baer & Tom Braithwaite, *Former ‘Car Tsar’ Rattner Close to Settling NY State Pension Case*, FIN. TIMES, Oct. 14, 2010, at 1; Tomoeh Murakami Tse, *Bloomberg Pulls Billions out of Quadrangle Group*, WASH. POST, Feb. 21, 2010, at A10.

29. For example, President Obama apparently concluded only some months into his term that he could achieve his goals in urban policy more effectively by engaging the Department of Housing and Urban Development and other agencies than through the Office of Urban Affairs inside the White House, headed by a “cities czar.” See Matt Chaban, *Will Urban Affairs Carrión?: White House Office Sidelined as Cities Czar Departs*, ARCHITECT’S NEWSPAPER, June 2, 2010, at 1. President George W. Bush similarly reversed his initial view that post-9/11 homeland security efforts should be based in the White House, ultimately supporting the creation of a Cabinet-level Department of Homeland Security. See Adriel Bettelheim & Jill Barshay, *Bush’s Swift, Sweeping Plan Is Work Order for Congress*, CONG. Q. WEEKLY, June 8, 2002, at 1498 (cited in BRANDICE CANES-WRONE, WHO LEADS WHOM? PRESIDENTS, POLICY, AND THE PUBLIC 1 (2006)); see also Barron, *supra* note 19, at 1102–03 (arguing that presidential efforts to shape policymaking through agency appointments have often been successful). Moreover, Presidents also often designate Cabinet members to negotiate legislative priorities and language with the Congress. For a recent example, see Jackie Calmes & Peter Baker, *As Time Runs Out, Debt Commission Still Lacks Votes*, N.Y. TIMES, Dec. 1, 2010, at A1 (“Mr. Obama assigned Treasury Secretary Timothy F. Geithner and Jack Lew, the White House budget director, to put together a tax deal with Congress.”).

Office rather than from the agencies or even the Executive Office. For the balance of this paper, I will call such officials—at work in the White House Office, tasked by the President to oversee policy in a particular substantive area, maintaining a high profile, and regardless whether they are assigned the monarchical moniker by the administration or the press—“czars.”³⁰

President Obama's proliferation of high-profile czars is his particular instantiation of a policy, common to all modern Presidents, of seeking to magnify his control over agency action in domestic policy. Even after the partial retrenchment of 2011,³¹ the strategy continues to offer Obama an attractive synthesis of the technocratic advantages traditionally associated with the agency form and the political responsiveness ordinarily attributed to the White House staff. That very synthesis, however, also makes presidential influence over agencies opaque to political accountability and legal controls. I therefore consider two categories of potential administrative-law response. One is to limit the ability of the President's staff to interact with agencies. Such contact could be forbidden, restricted, or saddled with transparency requirements. The other, better alternative is to relax some administrative constraints on agencies. In particular, a President's political preferences should be regarded more readily as legitimate justifications for agency decisions. Increased doctrinal room for a President to realize his political program by using the agency form will decrease his incentives to find politically and legally opaque ways to work such influence from the White House.

II. DESIGN FEATURES OF THE OBAMA CZAR SYSTEM

Every contemporary President has depended heavily upon a corps of personal deputies and advisors in the White House. Beyond the pure giving of advice, the President relies upon these individuals to manage his interactions with two other governmental entities capable of either advancing or thwarting any presidential program.³² These are the Congress

30. *Accord Sunset All Czars Act*, H.R. 59, 112th Cong. (2011) (proposing to prohibit the use of appropriated funds to pay czars' salaries, and defining czars as the “head of any task force, council, policy office within the Executive Office of the President, or similar office established by or at the direction of the President” who is appointed “without the advice and consent of the Senate” and “performs or delegates functions which (but for the establishment of such task force, council, policy office within the Executive Office of the President, or similar office) would be performed or delegated by an individual in a position that the President appoints by and with the advice and consent of the Senate”); *Examining the History and Legality of Executive Branch Czars: Hearing Before the S. Comm. on the Judiciary*, *supra* note 15, at 5–6 (statement of Bradley H. Patterson, Jr.).

31. *See supra* notes 10–13 and accompanying text.

32. Any presidential agenda worth pursuing has both a legislative and a bureaucratic component. *See* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1088 (1986) [hereinafter DeMuth & Ginsburg, *White House Review*] (“[E]very president has a program, and no program can be implemented in the modern regulatory state without regulatory planning and regulatory review by the Executive Office of the President.”); Christopher C. DeMuth & Douglas H. Ginsburg, *Rationalism in Regulation*, 108 MICH. L. REV. 877, 912 (2000) [hereinafter DeMuth & Ginsburg, *Rationalism*] (reviewing RICHARD L. REVESZ & MICHAEL A.

and the federal bureaucracy. Nelson Polsby therefore describes the President and his staff as “a presidential branch of government separate and apart from the executive branch,” which “sits *across* the table from the executive branch [and] imperfectly attempts to coordinate both the executive and legislative branches in its own behalf.”³³

With respect to the President’s bureaucratic agenda in particular, heads of agencies, although presidential appointees nominally within the “executive branch,” are emphatically not presidential agents.³⁴ If not “the natural enemies of the President,” as Vice President Charles Dawes’s classic formulation has it,³⁵ agency heads at least have long been effectively a “fourth branch” of government, with their own interests and incentives.³⁶ Agency heads therefore share with members of Congress, those other presidential antagonists, that they are systematic targets of presidential persuasion, negotiation, and occasional coercion.³⁷

The effort to exert control over the bureaucracy has been central to the modern presidency certainly since Nixon, and arguably reaches back considerably further.³⁸ In this effort, the President surely cannot personally persuade, negotiate, and coerce the legions of agencies that form the federal bureaucracy; he needs agents.³⁹ Those agents are, roughly speaking,⁴⁰

LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH (2008)) (reaffirming this observation).

33. Nelson W. Polsby, *Some Landmarks in Modern Presidential-Congressional Relations*, in BOTH ENDS OF THE AVENUE: THE PRESIDENCY, THE EXECUTIVE BRANCH, AND CONGRESS IN THE 1980S 1, 20 (Anthony King ed., 1983).

34. ANDREW RUDALEVIGE, *MANAGING THE PRESIDENT’S PROGRAM: PRESIDENTIAL LEADERSHIP AND LEGISLATIVE POLICY FORMULATION* 21 (2002).

35. *Dawes, Charles*, in THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT 171, 171 (John J. Patrick, Richard M. Pious & Donald A. Ritchie eds., 2001).

36. See DeMuth & Ginsburg, *Rationalism*, *supra* note 32, at 905–06 (examining incentive structures facing programmatic agencies); Strauss, *supra* note 14, at 579, 582, 586 & n.42.

37. See STEVEN A. SHULL, *PRESIDENTIAL POLICY MAKING: AN ANALYSIS* 147 (1979) (“The President cannot personally carry out policy. He can influence implementation only if bureaucrats follow his wishes. Compliance cannot be assumed; sometimes it is automatic, sometimes persuasion is needed. The bureaucracy is beyond the President’s control especially in domestic policy where it has been granted broad, often independent, authority by Congress. The bureaucracy has also become large and powerful in the domestic sphere”); RICHARD W. WATERMAN, *PRESIDENTIAL INFLUENCE AND THE ADMINISTRATIVE STATE* 2 (1989) (“In much the same manner as a president must bargain and compromise with Congress, a president should attempt to build support within the executive branch for that particular administration’s policies.”).

38. See FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 329–30 (1994) (arguing that, beginning with the Theodore Roosevelt Administration in 1903, “[f]rom the point of view of administration, the history of the presidency in the twentieth century has been the history of presidents’ attempts to gain control of the sprawling federal bureaucracy.”); Relyea, *supra* note 23, at 4 (“The Executive Office of the President represents an institutional response to needs felt by every occupant of the Oval Office, beginning with George Washington.”).

39. Cf. HUGH HECLLO, *A GOVERNMENT OF STRANGERS: EXECUTIVE POLITICS IN WASHINGTON* 1 (1977) (“For the President, his appointees, and high-ranking bureaucrats, the struggle to control the bureaucracy is usually a leap into the dark.”); CLINTON ROSSITER, *THE*

presidential staff who work in the White House Office.⁴¹ “[T]hat the President’s assistants should serve in a purely staff role and neither engage in order giving and operations on their own nor interpose themselves between the President and the Cabinet members” is a “proposition long abandoned in practice.”⁴² Interaction with the bureaucracy is a ubiquitous feature of the job of the White House staff.⁴³

AMERICAN PRESIDENCY 19–22 (1960) (securing bureaucratic buy-in is the most difficult task faced by Presidents).

40. The identification of White House Office employees as close presidential advisors and agency officials as bureaucrats distant from the president is inexact. Stephen Hess writes, “Although there is still a hazy distinction between White House personnel and those in the Executive Office of the President, the presidential complex can better be imagined as two concentric circles, the outer staff and the inner staff” STEPHEN HESS, *ORGANIZING THE PRESIDENCY* 179–80 (3d ed. 2002). Outer staff’s “assignments require little personal attention by the president,” or they “deal with matters in which his political stakes are modest,” even if they work in the White House Office; conversely, “[o]ccasionally inner staff people—Robert Kennedy in his brother’s administration—are not even located in the White House.” *Id.* at 180. Hugh Hecló, less usefully for this paper, chooses to distinguish between “political executives,” i.e., government employees hired for a short term with short-term political goals and civil servants signed on for the long haul. *See* HECLÓ, *supra* note 39, at 155.

41. *See* COLIN CAMPBELL, *MANAGING THE PRESIDENCY: CARTER, REAGAN, AND THE SEARCH FOR EXECUTIVE HARMONY* 3 (1986); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 947 (1980) (offering a typology of “jawboning” of administrative agencies by White House staff, based on examples from the Carter Administration).

42. James W. Fesler, *The Brownlow Commission Fifty Years Later*, 47 PUB. ADMIN. REV. 291, 293 (1987); *accord* Peter L. Strauss, *Legislation that Isn’t—Attending to Rulemaking’s “Democracy Deficit”*, 98 CALIF. L. REV. 1351, 1361 (2010) (“Cabinet Secretaries . . . answer only to the President *and White House staff*.” (emphasis added)).

43. *See* HECLÓ, *supra* note 39, at 163–64 (reporting that presidential advisors are not always reliable when they purport to speak for the president); RUDALEVIGE, *supra* note 34, at 21 (principal-agent problems involving the multiplication of “people who can plausibly invoke the president’s name” are “usually associated with presidential-bureaucratic relationships”); Fesler, *supra* note 42, at 293 (“[P]residential aides afflicted by hubris, from at least the Johnson Administration on, have given orders to Cabinet departments, sometimes contradictory orders from different assistants. Often they have given orders directly to subordinate officials in the departments, bypassing the Secretaries.”); Hugh Hecló, *The Changing Presidential Office*, in *THE MANAGERIAL PRESIDENCY* 23, 33 (James P. Pfiffner ed., 2d ed. 1999) (“Each presidential staff, in order to carry weight inside the office and with outsiders, seeks to invent ways that allow it to claim that its members are acting ‘at the direction of the President.’”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2290 (2001) (characterizing the issuance of “directives” by President “Clinton *and his White House staff*” to administrative agencies as “Clinton’s primary means, self-consciously undertaken, both of setting an administrative agenda that reflected and advanced his policy and political preferences and of ensuring the execution of this program” (emphasis added)); *id.* at 2293–95 (directives to administrative agencies a routine and “central part of [Clinton’s] governing strategy”); Samuel L. Popkin, *The Art of Managing the White House*, in *CHIEF OF STAFF: TWENTY-FIVE YEARS OF MANAGING THE PRESIDENCY* 1, 7 (Samuel Kernell & Samuel L. Popkin eds., 1986) (citing Theodore Sorensen for the observation that “what really matters is . . . who [in the White House] is allowed to invoke the president’s name or use his telephone or stationery”).

Specific instances of White House advisors seeking to influence agency behavior are easily accumulated. *See, e.g.,* HESS, *supra* note 40, at 178 (reporting that White House Counsel John Dean had no direct contact with President Nixon for a two-year period, but nevertheless “dealt with others in and out of government in the name of the president”); John

Each modern President has designed his White House domestic policy shop idiosyncratically, making personnel and organizational choices that he believes best suit his own policy agenda and leadership style.⁴⁴ (Not infrequently, Presidents come to regret their strategies, and reboot.⁴⁵) Although Barack Obama is not the first President to tinker with the organization of the White House Office, his choices, and in particular his multiplication of domestic policy czars, do signify an evolution in the capacity of the Office to exert presidential influence over bureaucratic activity.⁴⁶ This is particularly important for a President whose agenda requires so much bureaucratic action. Obama's declared domestic priorities—health care reform, financial services regulation, and climate change—rely at least as heavily upon bureaucratic as upon legislative decisions. Obama's need to shape bureaucratic decisions can only have intensified with the transition to divided government and a more truculent 112th Congress.⁴⁷

Two related aspects of the czar system telegraph what is new about Obama's organization of domestic policymaking in the "presidential

Carnevale & Patrick Murphy, *Matching Rhetoric to Dollars: Twenty-Five Years of Federal Drug Strategies and Drug Budgets*, J. DRUG ISSUES, Spring 1999, at 299, 317 (complaining that because of his inability to set drug control budgets, the federal drug czar "is not a czar, but simply an advisor seeking to convince and coerce both the executive branch agencies and [the] Congress"); Gary Fields, *White House Czar Calls for End to 'War on Drugs'*, WALL ST. J., May 14, 2009, at A3 ("The drug czar doesn't have the power to enforce any of these changes himself, but Mr. Kerlikowski plans to work with Congress and other agencies to alter current policies.").

44. See SHIRLEY ANNE WARSHAW, *THE DOMESTIC PRESIDENCY: POLICY MAKING IN THE WHITE HOUSE 1* (1997); Terry M. Moe, *The Politicized Presidency*, in *THE NEW DIRECTION IN AMERICAN POLITICS* 235, 238, 244–45 (John E. Chubb & Paul E. Peterson eds., 1985) (distinguishing between strategies of "centralization," i.e., managing from the White House, and "politicization," i.e., placing loyalists in agencies); Walter Williams, *George Bush and Executive Branch Domestic Policymaking Competence*, 21 POL'Y STUD. J. 700, 701 (1993) ("An individual president's predilections and policy competence are critical in shaping the executive branch policymaking process."); see also PERI E. ARNOLD, *MAKING THE MANAGERIAL PRESIDENCY* 353–54 (1986); HESS, *supra* note 40, at 187–88 ("Compared with the rest of government, the White House barely qualifies as an organization at all, if the term organization implies the existence of a fixed plan that is likely to look about the same tomorrow as it did yesterday Ultimately it is the president's style—his work habits, the way he likes to receive information, the people he prefers to have around him, the way he makes up his mind—that will be the key to how the White House is organized."); CHARLES O. JONES, *THE PRESIDENCY IN A SEPARATED SYSTEM* 70 (2d ed. 2005); Kagan, *supra* note 43, at 2309 (President Clinton's approach to managing the bureaucracy explained in part by "[t]raits and circumstances peculiar to" Clinton). Hecló describes organizing the White House Office as a "major problem of internal management." Hecló, *supra* note 43, at 23.

45. See *supra* notes 10–13 and accompanying text (describing Obama's partial retreat from the czar system after the 2010 midterm elections); WARSHAW, *supra* note 44, at 19–40 (describing similar, successive reorganizations of the White House in the Nixon Administration).

46. See Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 638–39 (2010) (Obama's czars are a major feature of his efforts to ensure that agencies reflect the presidential agenda).

47. See Jennifer Steinhauer & Robert Pear, *G.O.P. Newcomers Set out To Undo Obama Victories*, N.Y. TIMES, Jan. 3, 2011, at A1 ("refrain" of majority party in 112th Congress with respect to legislation passed by the 111th Congress is "Undo It").

branch." First, the President assigned portfolios to several of his most prominent czars that roughly parallel the portfolios of Cabinet agencies. Second, many of the czars he selected are senior policymakers with extensive substantive expertise in their areas of responsibility. They come to the administration from policy positions, rather than from political positions with the President's campaign or party.

Obama's establishment of separate czardoms for particular policy areas suggests that he is not attempting to further a single, cross-agency goal with respect to regulation generally. The health czar's mandate was about health, the climate czar's about climate, and the urban affairs czar's about cities. In this, Obama's approach to influencing the bureaucracy is distinct from those of earlier Presidents. Presidents Nixon, Carter, George H.W. Bush, and especially Reagan focused their efforts on imposing a deregulatory agenda across the fourth branch.⁴⁸ Controlling putative overregulation was a central political plank in both the Nixon and Reagan Administrations. In particular, Reagan, by Executive Order, created a mechanism that systematically involved the Executive Office of the President in regulatory review, by making the Office of Management and Budget (OMB), through its Office of Information and Regulatory Affairs (OIRA), the gatekeeper for all significant regulation.⁴⁹ This effort was pitched as one that would counteract the perceived proregulatory bias of administrative agencies, which, it was argued, reflexively tend to find cause to perform the functions that they are good at and that justify their existence.⁵⁰ OIRA's primary tool was cost-benefit analysis, a screen that the Executive Order imposed on all significant regulatory actions.⁵¹

As Elena Kagan has (now very famously) demonstrated, cost-benefit review by OIRA was plastic enough to thrive, reimagined, in the more pro-regulatory Clinton Administration.⁵² But Clinton's OIRA, like Reagan's, pursued an interagency agenda, rather than the field-specific mandates that characterize the Obama czars. OIRA has sought, in Democratic and

48. Kagan describes antecedents to Reagan's centralization of regulatory review in the Office of Information and Regulatory Affairs (OIRA), under the Ford and Carter Administrations, in her *Presidential Administration*, *supra* note 43, at 2276–78. On Carter's deregulatory agenda, see also Peri E. Arnold, *Executive Reorganization and the Executive Office of the President*, in *THE EXECUTIVE OFFICE OF THE PRESIDENT*, *supra* note 23, at 407, 434–35; DeMuth & Ginsburg, *Rationalism*, *supra* note 32, at 904 n.67.

49. See William F. West, *Presidential Leadership and Administrative Coordination: Examining the Theory of a Unified Executive*, 36 *PRESIDENTIAL STUD. Q.* 433, 434 (2006) (OIRA review "the furthest extension to date of centralized executive influence over administrative policy making").

50. See DeMuth & Ginsburg, *White House Review*, *supra* note 32, at 1080–81.

51. See REVESZ & LIVERMORE, *supra* note 32, at 171; DeMuth & Ginsburg, *White House Review*, *supra* note 32, at 1081–82.

52. Kagan, *supra* note 43, at 2281–82; accord BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 36 (2010) (describing Clinton's deployment of OIRA as a "power grab"); James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 *DUKE L.J.* 851, 853 (2001).

Republican administrations alike, to rationalize regulatory processes government-wide. The czar system lacks this feature.

OIRA's role as a centralized regulatory clearinghouse is also touted as a way to coordinate otherwise potentially conflicting regulatory efforts produced by a complex web of balkanized agencies with particular substantive agendas.⁵³ The Executive Orders governing OIRA emphasize an explicit role for OIRA in solving interagency coordination problems.⁵⁴ Interagency coordination was similarly an important justification for both the creation of the Executive Office of the President⁵⁵ and for czars in earlier administrations.⁵⁶ Thus, a primary task of the "drug czar" is to facilitate the coordination of agencies that traditionally work at cross-purposes.⁵⁷ In the case of illegal drug control, coordination was understood to be an especially pressing concern because law enforcement and health care agencies acted not just in ignorance of one another, but with active hostility toward one another's approach.⁵⁸

Coordination does not appear to be a major impetus for the contemporary czar system—notwithstanding that, like its predecessors, the Obama Administration often justifies czars on the basis of a need for coordination.⁵⁹ Although the czars' job descriptions do not perfectly match the boxes in the organizational chart of the fourth branch, some of the most

53. See DeMuth & Ginsburg, *White House Review*, *supra* note 32, at 1079 (centralized presidential control an "inevitable" consequence of coordination problems); *accord* Kagan, *supra* note 43, at 2278–79 (reviewing literature).

54. In addition to the White House's role in interagency management, "[t]he historical record illustrates a gradual expansion of the EOP to include an intergovernmental management function" as well. James A. Stever, *The Growth and Decline of Executive-Centered Intergovernmental Management*, PUBLIUS, Winter 1993, at 71, 74.

55. See Stephen K. Bailey, *The President and His Political Executives*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 1956, at 24, 29.

56. See Verkuil, *supra* note 41, at 949–51 ("No one quarrels with the need of the President and his advisors to coordinate policymaking by administrative agencies.").

57. See Carnevale & Murphy, *supra* note 43, at 312 ("The Drug Czar . . . must attempt to exert top-down pressure and control in a process that is fragmented"); *Reauthorization of the Office of National Drug Control Policy: Hearings Before the Legis. and Nat'l Sec. Subcomm. of the H. Comm. on Gov't Operations*, 103rd Cong. 185 (1993) (statements of Peter Reuter & Jonathan Caulkins) ("The impulse to create ONDCP was primarily the friction among federal agencies involved in controlling illicit drugs."); *see also* 21 U.S.C. § 1702(a) (2006) (establishing "in the Executive Office of the President an Office of National Drug Control Policy, which shall . . . coordinate and oversee the implementation of the national drug control policy"); *id.* § 1704 (establishing duties of line agencies to provide ONDCP with information in order to facilitate "coordination").

58. See MARK A.R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS 21 (1992).

59. See Adolfo Carrión, Jr., Foreword, *A New Urban Vision for a New Urban Reality*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 4 (2010) (Obama's first urban affairs czar justifying his office largely in terms of coordination); Shear & Connolly, *supra* note 3, at A1; Letter from Gregory Craig, White House Counsel, Obama Administration, to Senator Russell Feingold (D-WI) (Oct. 5, 2009) [hereinafter Craig Letter], *available at* <http://theplumline.whorunsgov.com/wp-content/uploads/2009/10/feingoldletter.pdf>. This presents a telling contrast with President Clinton's White House czars, whose mandates were noticeably more cross-cutting. See PATTERSON, *supra* note 17, at 265–80 (discussing czars in the Clinton White House for AIDS policy, the 1994 and 1998 Summit of the Americas, climate change, Y2K issues, race relations, and Native American affairs).

prominent czardoms come close.⁶⁰ The example of the overlapping domains of health care czar and HHS secretary is preeminent. Although czars undertake secondary assignments within the purview of other agencies—the climate czar was formally the “climate and energy czar,” with an interest in some Energy Department issues, the health czar advised the President about veterans’ affairs as well as Medicaid, and the urban affairs czar worked on the environment as well as housing and urban development—in this respect czars are no different from line agencies themselves. Obama’s czar system reenacts, rather than counteracts, pathologies associated with interagency coordination, overlap, and conflict.⁶¹

The other striking feature of Obama’s czars is that they are high-profile, senior officials with substantive experience in their policy fields. Previous Presidents had nearly all preferred to staff their White House Offices with political operatives bound by loyalty to the President, loyalty often forged in presidential or earlier campaigns.⁶² “[D]epartments bring to the table expert substantive knowledge usually unmatched in the White House staff; the President’s personal staffers offer political expertise and a single-minded devotion to the president’s interest.”⁶³ Obama’s appointments of high-profile ex-Cabinet officials to czar posts blur this dichotomy. Ex-Cabinet officials like Browner and Summers were identified much more clearly with a substantive area of policy than with political loyalty to the President who appointed them. This observation extends as well to

60. *Presidential Advice and Senate Consent: The Past, Present, and Future of Policy Czars: Hearing Before the S. Comm. on Homeland Sec. and Governmental Affairs, supra* note 9, at 55 (statement of James Pfiffner) (“From the president’s perspective, a proliferation of czars replicates the divisions already present in the departments and agencies of the executive branch.”).

61. See Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1469–70 (2009).

62. See ACKERMAN, *supra* note 52, at 34 (noting that “modern presidents have surrounded themselves with a White House staff of superloyalists” who play “a key role in further centralizing presidential control,” and making particular reference to powerful “White House ‘czars’”).

63. RUDALEVIGE, *supra* note 34, at 11; see *id.* at 22; HESS, *supra* note 40, at 180, 182; WARSHAW, *supra* note 44, at 214 (presidents rarely select holdovers from previous administrations for senior domestic policy positions); Hugh Hecl, *OMB and the Presidency—The Problem of “Neutral Competence”*, 38 PUB. INTEREST 80, 89 (1975) (Nixon established a “Domestic Council” whose “virtue would be not institutional routine but policy innovation, not continuity but personnel turnover, not professional detachment but loyalty to ‘the man.’”); Samuel Kernell, *The Evolution of the White House Staff*, in CAN THE GOVERNMENT GOVERN? 185, 198 (John E. Chubb & Paul E. Peterson eds., 1989) (substantive experts in the White House are junior and “[t]hose charged with planning and coordinating the affairs of the line staff, by contrast, remain generalists, working closely with the president on a wide range of issues”). An important exception to this pattern has been in economic policy. Presidents from Nixon to George H. W. Bush named the Secretary of the Treasury to chair the National Economic Council (formerly the Economic Policy Council or Economic Policy Board). Clinton shifted the chairmanship to the White House but continued to fill the post with senior individuals with substantial economic expertise. See PATTERSON, *supra* note 17, at 89–90; see also *infra* note 85.

policymakers lacking Cabinet-level service, such as Tom Daschle⁶⁴ and Elizabeth Warren.⁶⁵ And the expert, particularly the senior expert with his or her own career, behaves differently from the loyalist. Such people have their own ideas and agendas about health, the environment, and the economy.⁶⁶ Because they have substantive expertise, moreover, it is difficult to imagine that Obama would not expect or even desire that they would pursue their own agendas rather than act solely as his faithful agents, as a generalist White House staffer more plausibly would.⁶⁷ Obama picks his czars, of course, on the theory that their agendas substantially track his own. But this is the same principle that guides his Cabinet and other line-agency appointments.⁶⁸ If he wanted knee-jerk loyalty, or mouthpieces, Summers, Browner, and Warren were poor choices.

The conventional reason given for the consistent presidential adoption of structures that empower loyalists over agency heads is Presidents' built-in ("institutional," in the language of the presidency literature) preference for "responsive" over "neutral competence."⁶⁹ Although Presidents choose agency heads (subject to Senate confirmation),⁷⁰ once appointed those

64. See TOM DASCHLE, *CRITICAL: WHAT WE CAN DO ABOUT THE HEALTH-CARE CRISIS* (2008).

65. See, e.g., TERESA A. SULLIVAN, ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008); Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213 (2006); Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603 (2009).

66. See HESS, *supra* note 40, at 184 ("[T]he proven commodity, people with experience, are more likely to have their own agenda.").

67. See George A. Krause, *Organizational Complexity and Coordination Dilemmas in U.S. Executive Politics*, 39 PRESIDENTIAL STUD. Q. 74, 77 (2009) (citing sources); see also Strauss, *supra* note 42, at 1362 (describing, skeptically, this view). *But cf.* JONES, *supra* note 44, at 69 (writing before the Obama Administration that "many" presidential advisors have "strong policy commitments").

68. See DeMuth & Ginsburg, *Rationalism*, *supra* note 32, at 905.

69. See RICHARD P. NATHAN, *THE ADMINISTRATIVE PRESIDENCY* 3 (1983); WATERMAN, *supra* note 37, at 1; Moe, *supra* note 44, at 244.

70. It has been suggested that President Obama appointed area specialists to work in the White House largely in order to circumvent the appointments logjam in the Senate. This is plausible but incomplete, especially with respect to czars appointed early in his first term. During the 2008 presidential transition, it is unlikely that Obama was motivated primarily by concern that the people he wanted as czars would not be confirmed. Daschle was going to serve in the Cabinet as well as the White House; Carol Browner and Summers had been Cabinet members. And although the Senate confirmation process is, to be sure, arduous and slow, this has been so for much longer than the dysfunction that characterizes the current Senate. See Joel D. Aberbach & Bert A. Rockman, *The Appointments Process and the Administrative Presidency*, 39 PRESIDENTIAL STUD. Q. 38, 44-45 (2009); Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 921 (2009) ("By one measure, Senate-confirmed positions were empty (or filled by acting officials), on average, one-quarter of the time over th[e] administrations" from Carter to George W. Bush). Moreover, in the flurry of its initial czar appointments the new Obama Administration set for itself a similarly onerous process for appointing czars and Cabinet secretaries. See RATNER, *supra* note 6, at 54. And although a few czars might have been deemed unconfirmable (Summers comes to mind), many would have been plausible

heads assume roles that create particular incentives and shape their behavior. The classical concern about line agencies is not so much that they may, by choice, pursue their own agendas rather than the President's (although they may).⁷¹ Rather, it is that agencies, of necessity, will chase the agendas of others—of the industries they regulate, of the staffs whom they supervise, and of the congressional committees that feed them.⁷² Agencies get captured because they need their staffs,⁷³ their industries,⁷⁴ and their committees⁷⁵ in order to survive. Agency heads, immersed at least to some degree in the day-to-day management of their complex and multifaceted organizations, also lack quotidian contact with the presidential branch and enjoy little or no contact with the President himself.⁷⁶ As Christopher DeMuth and Douglas Ginsburg put it, "It will be no surprise if, left to swim in these treacherous waters, the agency head loses sight, sooner or later, of the shore from which he set off to implement the president's general policy preferences."⁷⁷

appointees for the agencies whose portfolios they shadow. See Mark Landler, *Candidates for Obama's Inner Circle*, N.Y. TIMES, Nov. 7, 2008, at A22 (speculating that Summers's remarks about women's intelligence, which putatively doomed his Harvard presidency, could lead "women's groups . . . [to] object if Mr. Obama offers him a cabinet appointment").

Avoiding the Senate became a stronger motivation for czar appointments after the President's initial honeymoon. See, e.g., Dennis, *supra* note 26, at A18 ("By appointing [Elizabeth] Warren to a post within the administration—much as the White House did with 'car czar' Steven Rattner and 'compensation czar' Kenneth Feinberg—Obama would free her to act as the bureau's director beginning immediately while avoiding a confirmation battle.").

71. See THOMAS J. WEKO, *THE POLITICIZING PRESIDENCY: THE WHITE HOUSE PERSONNEL OFFICE, 1948–1994*, at 112 (1995) (noting Nixon's complaints that agency appointees opposed his agenda on grounds including "programmatic" and "ideological" ones); Bailey, *supra* note 55, at 25 ("[M]any . . . political executives have not even started out as 'the President's men.'"). *But cf.* Barron, *supra* note 19, at 1121 ("[M]any new [agency] appointees . . . increasingly share the regulatory vision of the President and his party"; this is "a potentially serious cause for concern in its own right"). Concerns that a presidential appointee might pursue an agenda different from the president's apply to presidential staff as well as to agency appointees. See Verkuil, *supra* note 41, at 961 (such concerns regarding staff are "often expressed").

72. See Allison, *supra* note 22, at 43–44; Bailey, *supra* note 55, at 25; Kagan, *supra* note 43, at 2273.

73. See DeMuth & Ginsburg, *Rationalism*, *supra* note 32, at 905–06.

74. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–23 & nn.23–33 (2010) (reviewing literature).

75. See Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 MINN. L. REV. 1696, 1700–01 (2009).

76. *Accord* Popkin, *supra* note 43, at 7 ("Cabinet members can be so starved for the president's time, as Gerald Warren notes, that one will pull out his agenda when he meets the president in a receiving line after church."); DeMuth & Ginsburg, *Rationalism*, *supra* note 32, at 905 ("Once confirmed, . . . [a programmatic] agency head is unlikely to have regular contact with the president, apart perhaps from some ceremonial occasion, such as the dedication of a new facility or attendance at the White House Christmas party.").

77. DeMuth & Ginsburg, *Rationalism*, *supra* note 32, at 906; *accord* RUDALEVIGE, *supra* note 34, at 21 ("Presidents fear that once a bureaucrat puts the White House out of sight, she puts it out of mind as well; as Nixon staffer John Ehrlichman famously opined, departmental appointees go off and 'marry the natives.'" (quoting HAROLD SEIDMAN &

At the same time, under many circumstances substantive competence is preferable to reflexive loyalty to the President's person. The marginalization of the expert relative to the politico in presidential policymaking was routinely abhorred by scholars of the presidency when normative political science was more in fashion.⁷⁸ Presidents have missed expertise and distrusted loyalty as well.⁷⁹ Both Nixon and Carter experimented with Cabinet government, in which Cabinet secretaries were also to function as presidential policy advisors.⁸⁰ Terry Moe's argument that the institutional incentives of the President and of the agencies are fundamentally incompatible, however, appears to have carried the day.⁸¹ Academics' normative dislike of presidential administration faded in the face of its positive reality. Neither Nixon's nor Carter's efforts at Cabinet government succeeded. Nixon, with his second term, backtracked quickly toward a White House-centered structure, and no serious efforts to merge the presidential and executive branches have been made since Carter left office.⁸² Obama's domestic policy czars, then, can be seen as an ingenious compromise, a way to gain many of the advantages of neutral competence while avoiding the pitfalls of Cabinet government. If a czar's career and policy interests tend toward neutral competence, but she is removed from the agencies and therefore not subject to the agencies' pernicious (from the President's point of view) incentives, can the President have the best of both worlds?

It could well be. It is plausible to think that a substantive expert placed in charge of a line agency will behave differently than a substantive expert

ROBERT GILMOUR, *POLITICS, POSITION, AND POWER: FROM THE POSITIVE TO THE REGULATORY STATE* 82 (4th ed. 1986)).

78. See, e.g., Allison, *supra* note 22, at 44–45; Hecl, *supra* note 63, at 82–85, 90, 94 (cataloging the virtues of neutral competence and noting “real and growing danger that . . . the standards of neutral competence are being eroded”); Moe, *supra* note 44, at 263 (“Students of the institutional presidency are virtually unanimous in denouncing” the elevation of responsive over neutral competence); Williams, *supra* note 44, at 705 (“A top policy generalist who is loyal beyond question (and hence responsive) still poorly serves the president if he or she lacks the policy competence to assess policy proposals and integrate policy and politics.”); *id.* at 707–08 (ruining the lack of policy expertise among domestic policy staffers in the Reagan Administration).

79. See Aberbach & Rockman, *supra* note 70, at 40 (“[A]t least some of the time, presidents must recognize considerations of competence on matters that they think are important to the policy success of their administrations.”).

80. See RUDALEVIGE, *supra* note 34, at 49–50. President Carter was unusual in reorganizing the White House staff explicitly to “reduce[] . . . centralization of domestic policy development” and return policymaking authority to line agencies. Arnold, *supra* note 48, at 434; see Allison, *supra* note 22, at 44.

81. See Moe, *supra* note 44, at 263.

82. One close historical analogue to Obama's czars appears to be President Nixon's decision in his second term to name Treasury Secretary George Shultz as “assistant to the president in economic affairs” and three Cabinet secretaries—for Agriculture, HEW and HUD—as “supersecretaries” with broad portfolios. NATHAN, *supra* note 69, at 52; Allison, *supra* note 22, at 46 (noting “President Nixon's ‘super-cabinet’ proposal of 1971”). The parallels to Obama's plans for Daschle are particularly strong. Nixon's plan, however, was swamped by Watergate before it could have any impact. See NATHAN, *supra* note 69, at 55.

with a similar portfolio but without formal or legal authority.⁸³ Similarly, a single person who had once been in charge of a line agency could plausibly behave differently as a czar than she would were she restored to her earlier post.⁸⁴ These beliefs are plausible in light of the standard account of agency capture. Even if a czar does not have the "President first" attitude of the political operative, neither will he be pulled systematically away from the President's agenda by other powerful influences. If a czar starts off simpatico with the President, the President can plausibly hope the czar might stay simpatico.

Czars are less, and differently, susceptible to capture than agencies, but by no means are they immune. Many of the mechanisms associated with capture of agencies by the regulated do not apply to czars, but some do. Czars likely feel obligations to their professional communities as well as to the President.⁸⁵ More important, czars' dependence upon the political fortunes of the President and their lack of formal legal authority requires them to give some consideration to the preferences of regulated entities. Czars will often seek informal, unenforceable cooperation from regulated entities, or may seek to impose regulatory regimes that depend upon some level of voluntary compliance for implementation. Also, czars are like agency heads in preferring to maintain political support and political capital, other things equal, for revolving-door and other reasons.

On the internal side, czars do seem less susceptible to capture than ordinary agencies. Czars' staffs are smaller than agencies' and turn over with new administrations. Staffs still can develop their own cultures and versions of tunnel vision, but they are free from civil-service protection and

83. See RUDALEVIGE, *supra* note 34, at 20 (quoting presidential advisor Leslie Gelb to the effect that when departmental staffers are reassigned to the White House, they "behave very differently They become far more conscious of Presidential stakes and interests." (citations omitted)).

84. The case of Tom Daschle raises the question of whether *a single person* might behave differently if appointed as a czar while *simultaneously* serving as a line agency. Obama's desire to give Daschle both jobs can be explained by the initial prominence of the legislative, rather than bureaucratic, side of the President's health care agenda. Daschle, after all, was a master of the Senate. This argument is supported by the President's decision, when Daschle withdrew from consideration after his failure to meet his tax obligations became public, to split his portfolio. On the other hand, there is no reason that a sitting HHS secretary's responsibilities could not have included a very hefty dose of congressional relations without a parallel White House post. See HESS, *supra* note 40, at 191 ("As Joseph Califano pointed out, the primary need in an HEW secretary in 1964 and early 1965, 'when the bulk of . . . controversial and far-reaching health and education proposals was working its way through Congress,' was a person" skilled in lobbying, whereas needs changed once the legislative agenda was complete. (alteration in original)); Calmes & Baker, *supra* note 29. Daschle could even have been given the West Wing office, as a signal of status and of access to the President, without an associated czardom.

85. See, e.g., Hecl, *supra* note 43, at 26 ("More subtly, the Council of Economic Advisers serves as the voice of the economics profession" within the White House.); Marcia Lynn Whicker, *Economics, in THE EXECUTIVE OFFICE OF THE PRESIDENT*, *supra* note 23, at 131, 144 (Council of Economic Advisers board members' "close proximity to universities provides a direct conduit for new ideas and theories concerning economic growth and the economy to filter directly to the president").

from the long-term accretion of tricks and dodges that long-term bureaucrats use to divert or foil the policies of their principals. A czar's staff's incentives are therefore likely better aligned with their principal than an agency head's. Along the same lines, many agencies' organization charts are thick with layers of authority.⁸⁶ Some are also spaghetti bowls: a deputy may be Senate-confirmed and empowered to decide on certain matters that his ostensible superior cannot reverse.⁸⁷ These phenomena make intra-agency confusion and conflict legion. A czar keeping track of an agency can range vertically and horizontally across its structure unrestricted by the problems of who has what statutory authority.⁸⁸

Finally, czars are free of the burden of justifying their own actions to congressional committees. Their budgets come through the Executive Office of the President; they need not justify themselves to the Senate at confirmation; they partake of executive privilege, to the extent that it is available;⁸⁹ and they are generally immune, as discussed below, to administrative discovery through the Freedom of Information Act (FOIA).⁹⁰

This analysis of capture suggests that a czar system provides a President with substantive expertise relatively more reliable than similar expertise generated by line agencies. This should affect the relations between the presidential and executive branches in two related ways. First, czars increase the *capacity* of the President to jawbone, lobby, and directly supervise agency activities. Presidents have always been able to phone an agency head—or have a Chief of Staff phone, or have a low-level assistant from the policy staff phone.⁹¹ But the President and his inner political staff

86. See PAUL C. LIGHT, *A GOVERNMENT ILL EXECUTED: THE DECLINE OF THE FEDERAL SERVICE AND HOW TO REVERSE IT* 52–77 (2008).

87. See 5 U.S.C. § 551(1) (2006) (defining an “agency” for APA purposes as “each authority of the Government . . . whether or not it is within or subject to the review by another agency”).

88. See NATHAN, *supra* note 69, at 39 (making the point about outside supervision of spaghetti-bowl agencies with reference to the White House staff generally).

89. The scope of executive privilege doctrine is highly unsettled, largely because in disputes over privilege both parties pay a high price for not backing down, leading to idiosyncratic settlements that do little to clarify the doctrine. See generally Mark J. Rozell, *Executive Privilege and the Modern Presidents: In Nixon's Shadow*, 83 MINN. L. REV. 1069 (1999) [hereinafter Rozell, *Executive Privilege and the Modern Presidents*] (surveying such disputes from the Ford through Clinton Administrations). It is generally assumed, however, that such privilege as does apply protects “other high-ranking executive officials,” as well as the President himself. Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 497 (2007); see also Mark J. Rozell, *The Clinton Legacy: An Old (or New) Understanding of Executive Privilege?*, in *THE PRESIDENCY AND THE LAW: THE CLINTON LEGACY* 58, 66 (David Gray Adler & Michael A. Genovese eds., 2002) (“[T]he Clinton administration adopted the broad view that all White House communications are presumptively privileged.”). This protection is most straightforwardly applied to high-level White House staff in light of one of the principal policy justifications for privilege, the need to “protect[] the privacy of White House deliberations when it is in the public interest to do so.” Rozell, *Executive Privilege and the Modern Presidents*, *supra*, at 1070.

90. See *infra* Part III.

91. For some early examples, see Verkuil, *supra* note 41, at 945–47, 951.

can focus on particular areas of substantive policy only sporadically. Their jobs involve a never-ending cascade of distractions. Czars are similar to the political staff in being high-level and high-profile White House advisors, but different from the political operatives in their substantive (rather than political) focus, their seniority, and their expertise. The czars may not have immediate, consistent access either to the President's ear or his instructions, and they may not be immune from capture, but they are likely to be more inclined to promote the President's agenda than the agency. They are also likely to be both interested in and capable of fairly consistent oversight. Should an agency begin to diverge from presidential preferences, the czar is well positioned to find out and make credible the otherwise more remote threat that such departures will be met with presidential response. Czars do not give a President any powers he did not have before; rather, they enhance his ability to exercise the powers he already has.⁹²

Second, this sort of capacity for influencing the bureaucracy is opaque to political accountability and judicial review. The courts have held that presidents can jawbone however they like, outside of the context of adjudicatory proceedings or other proceedings that raise due process concerns.⁹³ They can do so before and after the comment period, and they can do so for reasons outside of the range of reasons that agencies can legally consider under their organic statutes—including nakedly political reasons. Agencies must justify their regulatory decisions based on reasonable readings of their organic statutes; but Presidents' reasons are their own. They need not be divulged even to the agency, and do not appear in the record for public or judicial review. The White House Office is "structurally well-equipped" to influence agency behavior secretly.⁹⁴ If czars allow the President to pressure agencies more consistently and successfully, such successes will not ordinarily be visible to outsiders.

III. ADVICE AND TRANSPARENCY: PRESIDENTIAL ADVISORS IN ADMINISTRATIVE LAW

Robert Byrd, now deceased but at the time the second-ranking Democrat on the Senate Appropriations Committee, wrote a letter of protest to President Obama amid his early flurry of czar investitures. The Senator, making specific reference to czars for health care, climate, and urban affairs, complained,

I am concerned about the relationship between these new White House positions and their executive branch counterparts. Too often, I have seen

92. This is true, moreover, under both unitary and non-unitary understandings of the presidency. *See infra* Part IV.

93. Ex parte contact from the presidential branch in adjudicatory proceedings is generally unlawful. *See Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1542–43 (9th Cir. 1993); *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 672 F.2d 109, 113 (D.C. Cir. 1982).

94. *See* Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1742 (2009).

these lines of authority and responsibility become tangled and blurred, sometimes purposely, to shield information and to obscure the decision-making process.

...

The rapid and easy accumulation of power by White House staff can threaten the Constitutional system of checks and balances. At the worst, White House staff have taken direction and control of programmatic areas that are the statutory responsibility of Senate-confirmed officials. They have even limited access to the president by his own cabinet members. . . . In too many instances, White House staff have been allowed to inhibit openness and transparency, and reduce accountability.⁹⁵

Twenty-one months later, Representative Darrell Issa, the freshly minted chair-apparent of the House Oversight and Government Reform Committee after the Republican victory in the 2010 midterm House elections, echoed these objections, promising scrutiny for “unconfirmed czars”⁹⁶ whose power demonstrates the “arrogance of government.”⁹⁷

Under conventional administrative-law doctrine, these sorts of objections are quite overblown. If a presidential staffer displaces a Senate-confirmed official in the discharge of statutory responsibility, that staffer acts *ultra vires* and without legal effect. On the other hand, a staffer’s bare suggestions to an agency impose no legal obligations and are therefore permissible (absent due process concerns).⁹⁸ If an agency acquiesces to such suggestions mechanically, foolishly, or illegally, the error is on the agency’s head. Finally, Cabinet and other agency officials obviously have

95. Letter from Senator Robert C. Byrd to President Barack Obama (Feb. 23, 2009) [hereinafter Byrd Letter], available at http://www.eenews.net/public/25/9865/features/documents/2009/02/25/document_gw_02.pdf.

96. Margaret Kriz Hobson, *Issa’s Oversight Agenda To Challenge Obama*, CQ TODAY, Nov. 3, 2010, 2010 WLNR 22308205.

97. Brian Friel, *Where Will the G.O.P. Go Digging?*, N.Y. TIMES, Nov. 14, 2010, at WK9. Byrd and Issa were not alone among their congressional colleagues. Several Senators, including Susan Collins (R-ME) and Russell Feingold (D-WI), sent President Obama inquiries similar to Byrd’s. See Craig Letter, *supra* note 59. Senator Kay Bailey Hutchison (R-TX) complained that czars “hold unknown levels of power over broad swaths of policy,” power they could use to “impose the administration’s agenda on the heads of federal agencies and offices”—which, Hutchison argued, would be in “direct contravention of the Framers’ intentions.” Kay Bailey Hutchison, *Czarist Washington*, WASH. POST, Sept. 13, 2009, at A23. Senator Collins also complained about accountability after the 2010 appointment of Elizabeth Warren as a consumer czar: “The last thing we need is another ‘czar’ that is unaccountable to Congress and the American people. This is certainly not what Congress intended when it created this important position.” Dennis, *supra* note 26, at A18.

Rep. Eric Cantor (R-VA), on the cusp of becoming House Majority Leader, made similar complaints. Eric Cantor, *Obama’s 32 Czars*, WASH. POST, July 30, 2009, at A19. Cantor’s objections found legislative expression, first in the unenacted Sunset All Czars Act, H.R. 59, 112th Cong. (2011), which proposed to defund all executive branch czars, and then in the April 2011 short-term budget agreement, which defunded only the czars for health care, climate, automobiles, and urban affairs. See Department of Defense and Full-Year Continuing Appropriations Act, H.R. 1473, 112th Cong. § 2262 (2011) (enacted).

98. See *supra* note 93.

no constitutional or other right to presidential access. Such access is a scarce resource and Presidents guard it jealously.

This sort of analysis dominates the response that Obama's then-White House Counsel, Gregory Craig, made to objections like those in Byrd's letter.⁹⁹ Craig's position was straightforward and lawyerly. Most czars are officers of the United States, he explained; they have either line agency appointments or are confirmed by the Senate to statutorily defined offices within the Executive Office of the President.¹⁰⁰ The remaining czars, including "the supposed Health, Energy and Environment, Urban Affairs, and Domestic Violence 'czars,'" are "senior policy advisors" to the President on his personal staff.¹⁰¹ Their advisory role, asserted Craig, "is, *and always has been*, the traditional role of White House staff."¹⁰²

Craig's letter highlights several features of the administrative law that governs presidential advisors. First, presidential staffers do not enjoy the legal status of "officers" or of "agencies." This observation of course does not apply to those "czars" who hold appointments to Cabinet or other line agencies, rather than working exclusively for the White House Office or the Executive Office.¹⁰³ These czars, legally uninteresting, are "officers" of the United States by virtue of their appointment. Moreover, per the definitions of the APA, most such czars are "agencies," an "authority of the Government of the United States, whether or not it is within or subject to review by another agency."¹⁰⁴ As an "agency," the official exercises whatever authority is given her by the relevant organic statute, and is subject to the panoply of requirements the APA and related statutes impose.¹⁰⁵ As noted above, that a particular officer/agency is also a "czar" might indicate political reality, political aspiration, a public relations strategy, or merely a stray characterization in the press that sticks. None of this affects the legal status or duties of the czar in question.

99. Craig Letter, *supra* note 59. The Craig letter is discussed at Coglianese, *supra* note 46, at 641–42.

100. Craig Letter, *supra* note 59, at 1–2. Executive Office officials who require Senate confirmation are discussed *supra* notes 24–26 and accompanying text.

101. *Id.* at 2; accord David B. Rivkin Jr. & Lee A. Casey, *Misplaced Fears About the 'Czars'*, WASH. POST, Sept. 19, 2009, at A15 ("[T]he only power exercised by White House czars comes from their proximity to the president and the access this provides. Yes, as many will note, that truly is power. But it is not significant authority under U.S. law—which only the Constitution or Congress can confer.").

102. Craig Letter, *supra* note 59, at 3.

103. See *supra* notes 21–22 and accompanying text.

104. 5 U.S.C. § 551(1) (2006).

105. *But see* 5 U.S.C. ch. 9 (empowering the President to reorganize agencies); PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 30 (2002) ("[M]any presidents have taken it upon themselves to create new agencies, eliminate existing organizations, and reorganize others by executive order with or without congressional approval."); William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095 (2002) (same). Unilateral presidential reorganization of administrative agencies "fell into disuse," but did not dissipate entirely, after *INS v. Chadha*, 462 U.S. 919 (1983), held the legislative veto unconstitutional. See COOPER, *supra*, at 30–32 (listing contemporary examples).

Czars in the White House, by contrast, are unconfirmed by the Senate and lack any congressional authorization to act. That “principal Officer[s]” of the United States must be appointed by the President¹⁰⁶ does not imply the converse, that all federal employees appointed by the President are principal officers. Federal employment itself is neither a necessary nor sufficient criterion of an “officer.”¹⁰⁷ Rather, to be an officer one must be “delegat[ed] by legal authority of a portion of the sovereign powers of the federal Government.”¹⁰⁸ The White House czar has no sovereign powers at his disposal; she is, as Craig says, merely a policy “advisor.”¹⁰⁹ The czar neither “bind[s] third parties, or the Government itself, for the public benefit” nor “administer[s], execute[s], or interpret[s] the law.”¹¹⁰ Indeed, the czar may not do so; the President’s power to “delegate functions” to subordinate officials is restricted under the Presidential Subdelegation Act of 1950 to officials “required to be appointed by and with the advice and consent of the Senate.”¹¹¹ A czar is therefore neither a “principal Officer” of an “executive Department[]”¹¹² nor even an “inferior Officer[.]”¹¹³ Rather, the czar is an at-will employee of the President, hired under the congressional grant of power to the President to hire his own staff, who “shall perform such official duties as the President may prescribe.”¹¹⁴

That czars are not officers does not imply that they are not “agenc[ies]” for APA purposes; the APA definition says nothing about officers, only that an “agency” is an “authority” of the United States. The Supreme Court, however, has held that the President himself is not an APA “agency.”¹¹⁵ This conclusion is not clear from the face of the statute. The APA states that all “authorit[ies] of the Government of the United States” are agencies except for those specified on a statutory list; and that list of exclusions includes “the Congress” and “the courts” but makes no mention of the President.¹¹⁶ The Court nevertheless excludes the President “[o]ut of

106. U.S. CONST. art. II, § 2, cl. 1; *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

107. See *Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. (2007), available at <http://www.justice.gov/olc/2007/appointmentsclausev10.pdf> at 1, 5.

108. *Id.*

109. Craig Letter, *supra* note 59.

110. *Officers of the United States Within the Meaning of the Appointments Clause*, *supra* note 107, at 12.

111. 3 U.S.C. § 301 (2006).

112. U.S. CONST. art. II, § 2, cl. 1.

113. *Id.* art. II, § 2, cl. 2; *cf. Morrison v. Olson*, 487 U.S. 654, 671–72 (1988) (“inferior” officers are subordinate to principal officers, and may be appointed and removed by them, but they are authorized by Congress to perform “certain, limited duties”).

114. 3 U.S.C. §§ 105(a)(1), 107(a)(1). *Contra* Douglas S. Onley, Note, *Treading on Sacred Ground: Congress’s Power To Subject White House Advisers to Senate Confirmation*, 37 WM. & MARY L. REV. 1183, 1191–92 (1996) (suggesting that presidential advisers and their staffs are “inferior officers”).

115. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

116. *Id.* (citing 5 U.S.C. § 551(1)).

respect for the separation of powers and the unique constitutional position of the President.”¹¹⁷

What about presidential advisors under the APA? Because presidential staff do not take final agency action, this question has been most intensively litigated under FOIA.¹¹⁸ FOIA uses a definition of “agency” more expansive than that used under the rest of the APA, in that it explicitly includes “any . . . establishment in the . . . Executive Office of the President.”¹¹⁹ The Supreme Court, relying in substantial part upon the legislative history of FOIA, held nevertheless that a request for record of Henry Kissinger’s activities as National Security Advisor need not be honored under FOIA because the “establishment[s]” referenced in the Act do not include the “Office of the President” and “the President’s immediate personal staff.”¹²⁰ Subsequently, the D.C. Circuit, in *Meyer v. Bush*,¹²¹ crafted a functional test to determine whether units in the Executive Office of the President are “establishments” in that office and therefore subject to FOIA: “establishments” must have “substantial independent authority”¹²² to “issue formal, legally authoritative commands to entities or persons within or outside the executive branch”¹²³ that they exercise with a “degree of independence from the President.”¹²⁴ Determining whether the degree of independence was requisite, the court held, requires a multi-factor analysis that weighs “the nature” and “scope of the delegation” from the President, “[p]roximity to the President, in the sense of continuing interaction,” and whether the unit has a “self-contained structure.”¹²⁵ For the purpose of this inquiry, *Meyer*’s crucial feature is its position that entities within the Executive Office of the President whose only role is to “advise and assist the President,” even if outside of the “Office of the President” and even if created by statute, are not “establishments.”¹²⁶ They are like “the White House staff.”¹²⁷

Given the prevailing view that FOIA’s definition of “agency” is more expansive than the APA’s, these cases make clear that a “czar” who is an immediate advisor to the President without independent or statutory responsibilities is not an APA “agency” but an employee. Especially given the President’s own status under the APA, such a czar has no formal legal

117. *Id.* at 800.

118. 5 U.S.C. § 522.

119. *Id.* § 552(f)(1).

120. *Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 153, 156 (1980) (quoting H.R. REP. NO. 93-1380, at 15 (1974) (Conf. Rep.), *reprinted in* 1974 U.S.C.C.A.N. 6285, 6293).

121. 981 F.2d 1288 (D.C. Cir. 1993).

122. *Id.* at 1292 (emphasis omitted) (quoting *Soucie v. David*, 448 F.2d 1067, 1073–75 (D.C. Cir. 1971)) (internal quotation marks omitted).

123. *Id.*

124. *Id.* at 1293 (emphasis omitted).

125. *Id.*

126. *Id.* at 1293 & n.4 (quoting *Soucie*, 448 F.2d at 1075) (internal quotation marks omitted).

127. *Id.*

duties or obligations regarding the administrative procedures she employs. Under *Meyer*, this conclusion should be unaffected by the current penchant for giving senior advisors staffs of their own or denominating them as the “Directors” of “Offices” (of Health Policy, of Energy and Climate Policy, of Urban Affairs) within the White House Office. Even the “hybrid” czars like the drug czar or the OIRA head, located within the Executive rather than the White House Office, are likely to have relatively few administrative-procedure obligations with respect to the conduct of their work, even if they are, as they will not always be, subject to FOIA.

A second feature of the administrative law of the presidential advisor, made clear both by the exchange of letters between Craig and the members of Congress and by the case of Executive Office officials, is that the Congress would like to exert more authority over presidential advising than it does, while being simultaneously unwilling to go as far as it could.¹²⁸ It routinely, for example, authorizes the hiring of presidential staffers and budgets monies with which to pay their salaries, although it need not do so.¹²⁹ The 2011 budget deal forbidding expenditures for czars’ salaries and expenses is both unusual and halfhearted, reaching as it does only four czar positions that were vacant on the date of enactment.¹³⁰ More typically, the Congress has favored the less aggressive strategy of seeking to bureaucratize the presidential branch. The Congress creates units and sub-units within the Executive Office of the President, defines their duties, sets their budgets, and often requires that their heads be nominated by the President and confirmed by the Senate.¹³¹ It does this sometimes by coopting structures that Presidents establish, and sometimes by imposing structures upon Presidents that Presidents would never have developed on their own. As the Executive Office has grown, it has begun increasingly to mirror the spaghetti-bowl, agency-within-agency structure that the Congress has imposed upon the fourth branch.¹³²

128. See Verkuil, *supra* note 41, at 962. For how far Congress might go in theory, see *infra* Part IV.

129. See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1154–55 (1999) (noting congressional prerogative to refuse to fund even those presidential assistants necessary to the discharge of the executive power); see also Relyea, *supra* note 23, at 25 (“Congress, respecting the Constitution’s separation of powers, has allowed the president to exercise a free hand with regard to the Executive Office [of the President]. He may create a temporary EOP body and use appropriated discretionary funds to finance such a unit.”).

130. See *supra* note 97. More sweeping restrictions on the funding of czars were proposed, but not enacted, in the 112th Congress. See Sunset All Czars Act, H.R. 59, 112th Cong. (2011) (proposing to defund all executive branch czars appointed without advice and consent).

131. See Relyea, *supra* note 23, at 25; Onley, *supra* note 114, at 1183–85 & n.13, 1210–11 (noting congressional success in imposing some control over staff appointments).

132. One example, which carried some potential for conflict, was the simultaneous operation during the first two years of Obama’s presidency of a White House Office of Energy and Climate Change Policy, created by President Obama within the White House Office and headed by the “climate czar,” see *supra* note 4 and accompanying text, and the Council on Environmental Quality (CEQ), created by the Congress within the Executive Office of the President with a “Chairman” subject to advice and consent, see 42 U.S.C.

This strategy has not been, from the point of view of the Congress, particularly effective. This may explain why Presidents have bothered to oppose it only rarely.¹³³ The structure that the Congress has imposed upon the Executive Office has made it, like the agencies, too big and too sprawling a structure for a President to use for effective policy planning.¹³⁴ But, even if a President must appoint a particular officer in the Executive Office, he need not give them something to do; and even if the law requires the officer to do a particular something, the President need not take whatever information is gathered, or report written, into account.¹³⁵ Similarly, Presidents can task people with one title to do work formally in the province of other people with other titles. For example, the prohibition on expenditures for certain czars contained in the 2011 budget deal¹³⁶ does not, and probably effectively cannot, prevent the President from assigning those czars' portfolios to other advisors in the West Wing. Indeed, such reassignment appears to be precisely the President's policy.¹³⁷ So long as it remains possible freely to hire, fire, organize, and re-organize within the White House Office, congressional efforts to regiment the presidential branch seem certain to fail, beyond the self-control imposed by FOIA (which, as understood by the courts, itself encourages Presidents to move key functions out of the Executive Office and into the White House Office). It remains true that the "degree to which the domestic policy office interacts with the departments and the process used for that interaction is the least institutionalized part of the domestic policy process."¹³⁸

Finally, Craig's response to the senators demonstrates how little purchase the value of "transparency" has had upon the legal obligations of

§ 4342 (2006). Matters were further complicated by the establishment of the czar for green jobs, a position held briefly in 2009 by Van Jones, within the CEQ. *See* Michael Burnham, *Author-Activist Tapped as White House 'Green' Jobs Adviser*, N.Y. TIMES, Mar. 10, 2009 (Jones begins work in the CEQ on March 16, 2009); Jonathan Weisman, *Obama Adviser Resigns Amid Controversy*, WALL ST. J., Sept. 7, 2009 (Jones resigns on September 6, 2009); Craig Letter, *supra* note 59, at 2 (asserting that the green jobs czar was a CEQ employee and that the CEQ, "although located in the Executive Office of the President, is no different than a federal agency for the sake of congressional oversight," and also noting that in October 2009 the green jobs position was "currently vacant"). The climate czar position itself was eliminated in 2011. *See* Calmes, *supra* note 11. For the breadth of the EOP in general, see Harold C. Relyea, *Profiles of the Principal Units of the Executive Office of the President, 1939-1992*, in THE EXECUTIVE OFFICE OF THE PRESIDENT, *supra* note 23, at 447, 447-60.

133. Onley, *supra* note 114, at 1184-85. For President Obama's reaction to the budgetary restrictions on expenditures for certain czars, see *infra* Part IV.

134. *See* Fesler, *supra* note 42, at 293.

135. *See* HESS, *supra* note 40, at 185-87; Hecl, *supra* note 43, at 26 ("Legal constraints and political constituencies in the presidency have grown in the past two decades, but a president can try to 'manage around' them by observing the formalities.").

136. *See* Department of Defense and Full-Year Continuing Appropriations Act, H.R. 1473, 112th Cong. § 2262 (2011) (enacted).

137. *See* James Risen, *Obama Takes on Congress over Policy Czar Positions*, N.Y. TIMES, Apr. 16, 2011 (White House spokesman declaring that the czar "positions referred to in the [budget] bill have been restructured," and that the White House is "consolidating several positions and shifting responsibilities to the White House Domestic Policy Council").

138. WARSHAW, *supra* note 44, at 12.

presidential staff. Byrd is right that the activities of the White House Office in general, and the czar system in particular, promote opacity, allowing “lines of authority and responsibility [to] become tangled and blurred, sometimes purposely, to shield information and to obscure the decision-making process.”¹³⁹ This is my argument in Part II. Byrd’s concerns, to be sure, are entirely parochial; he abhors not the lack of transparency per se, but only the possibility that the Congress might have to struggle harder to discern what the President is up to.¹⁴⁰ The Congress, no less than the President, is happy to manufacture policy in the shadows. Byrd and his peers opposed the czars because they were a potentially effective new tactic in the President’s perennial struggle with the Congress to control agency behavior.

But transparency benefits many actors beyond the Congress. The public, the press, regulated communities, and the courts also desire information. Transparency is therefore cited frequently as a core value of administrative law.¹⁴¹ And transparency has been a particular concern as regards executive control over agency action. One of the debates over OIRA, for example, has been over the extent to which its influence upon significant regulatory actions is and should be visible to the public and to reviewing courts.¹⁴² The disclosure of presidential influence, like the disclosure of other factors leading to administrative decisionmaking, is to many obviously and uncontroversially beneficial.¹⁴³ To the extent that the czar system promotes opacity, it undermines this important norm.

139. Byrd Letter, *supra* note 95.

140. *Id.* (citing several incidents in which the Executive Office of the President has blocked congressional testimony by presidential advisors).

141. See, e.g., Mark Fenster, *Seeing the State: Transparency as Metaphor*, 62 ADMIN. L. REV. 617, 619 (2010) (transparency “a foundational concept for federal and state administrative laws”).

142. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO-03-929, RULEMAKING: OMB’S ROLE IN REVIEWS OF AGENCIES’ DRAFT RULES AND THE TRANSPARENCY OF THOSE REVIEWS 52–59 (2003) (reviewing efforts to increase the transparency of OIRA); Bressman, *supra* note 26, at 508 (“President Bush’s ‘regulatory czar’ at OMB [i.e., OIRA Director], John D. Graham, has elevated visibility to an art form. The White House website provides a log of his meetings, memoranda to agency heads, and general guidance on rulemaking.” (citing Stephen Power & Jacob M. Schlesinger, *Redrawing the Lines: Bush’s Rules Czar Brings Long Knife to New Regulations*, WALL ST. J., June 12, 2002, at A1)); John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953, 967–68 & n.73 (2006) (“OIRA does its work openly,” except to the extent that openness “must be balanced with the deliberative process necessary to open and frank communications within the Executive Branch”); Kagan, *supra* note 43, at 2316 (noting that the stated Bush/Graham preference for transparency in OIRA operations reverses the Reagan administration’s assignment of “a high value to the confidentiality of internal government discussions”); Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1149–50 (2010) (arguing that most Presidential influence under OIRA aegis is opaque notwithstanding representations to the contrary).

143. Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 92 (2006) (“the importance of transparency is uncontested”).

IV. THE SEPARATION OF POWERS AND THE REGULATION OF WHITE HOUSE STAFF

The separation of powers is sometimes thought to push in the other direction, requiring the law to leave the President's staff alone. In this part, I argue that separation of powers imposes no such requirement.

President Obama signaled a contrary view in a signing statement issued in conjunction with the 2011 budget extension. As noted above,¹⁴⁴ the laboriously negotiated extension prohibited, in section 2262, use of government funds to "pay the salaries and expenses" for czars in charge of health, climate, the automobile industry, or urban affairs.¹⁴⁵ The relevant portion of Obama's signing statement reads, in its entirety:

Section 2262 of the Act would prohibit the use of funds for several positions that involve providing advice directly to the President. The President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, and do so not only from executive branch officials and employees outside the White House, but also from advisers within it.

Legislative efforts that significantly impede the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed. Therefore, the executive branch will construe section 2262 not to abrogate these Presidential prerogatives.¹⁴⁶

It is a nicely ironic move to issue a signing statement in defense of presidential czars, because the presidential signing statement, like the presidential czar,¹⁴⁷ has itself been condemned as inimical to the separation of powers,¹⁴⁸ identified as a presidential tool with significant rhetorical as well as substantive dimensions,¹⁴⁹ and analyzed as a tool to expand presidential power relative to both the Congress¹⁵⁰ and to the

144. See *supra* notes 11–13, 97 and accompanying text.

145. See Department of Defense and Full-Year Continuing Appropriations Act, H.R. 1473, 112th Cong. § 2262 (2011) (enacted).

146. Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act (Apr. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473>.

147. The analogy between czars and signing statements is drawn at Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 274–76 (2010).

148. See Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 12 (2007).

149. See Christopher S. Kelley, *The Law: Contextualizing the Signing Statement*, 37 PRESIDENTIAL STUD. Q. 737, 737 (2007). For the symbolic role of czars, see *supra* notes 18–20 and accompanying text.

150. See Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 516, 518 (2005).

bureaucracy.¹⁵¹ Nevertheless, the contrast between the elliptical text of the President's statement and Gregory Craig's lawyerly defense of the czars¹⁵² could hardly be more stark.

Section 2262 restricts only the expenditure of funds for particular czars' "positions."¹⁵³ It does not purport to constrain the discretion of the White House staff or the topics regarding which they advise the President; moreover, it maintains that staff at a very healthy size. Surely the President does not endorse the frivolous position that the Congress bears a constitutional duty to fund a presidential staff as large as the President might desire.¹⁵⁴ It is therefore hard to see how anyone could "construe section 2262" in any way to "significantly impede" or "abrogate . . . Presidential prerogatives" to receive advice.¹⁵⁵ This is presumably why the signing statement is careful nowhere to state that section 2262 is itself a "[l]egislative effor[t] that significantly impede[s] the President's ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers."¹⁵⁶ It is also striking that the President issued the statement notwithstanding that the provisions complained of were moot upon enactment, all of the czar positions affected already having been eliminated or left vacant by the White House.¹⁵⁷

These features, along with oblique phrasing that manages to suggest the unconstitutionality of the section without actually saying so, suggests that the signing statement is best read rhetorically¹⁵⁸: not as an effort to nullify section 2262 but as a signal to the Congress that the President is anxious to assert his interests with respect to future debates surrounding White House staff. It is, moreover, unlikely that the President is concerned only with possible legislative efforts intended purely to limit his access to advice; the argument for the unconstitutionality of such legislation is strong.¹⁵⁹ Rather, the looming question about czars is whether the Congress, having allowed the President to hire advisors, may then circumscribe those advisors' power to interact with the Congress and the bureaucracy in ways more constraining than could be imposed upon the President himself.

151. See Kelley, *supra* note 149, at 741; M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27, 31–33 (2007).

152. See *supra* Part III.

153. See Department of Defense and Full-Year Continuing Appropriations Act, H.R. 1473, 112th Cong. § 2262 (2011) (enacted).

154. See Prakash, *supra* note 129, at 1154–55.

155. Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act (Apr. 15, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/04/15/statement-president-hr-1473>.

156. *Id.*

157. See *supra* note 137.

158. See Kelley, *supra* note 149, at 737.

159. See *United States v. Nixon*, 418 U.S. 683, 705–06 (1974) (“[T]he protection of the confidentiality of Presidential communications has . . . constitutional underpinnings.”); Verkuil, *supra* note 41, at 961 (“It would in all likelihood be unconstitutional under *United States v. Nixon* for Congress to attempt by legislation to deprive the President of his executive privilege in private vertical dealings with staff . . .”).

I argue, contrary to the implied position of the signing statement, that the Congress may do so. This conclusion holds, moreover, regardless whether one embraces the argument that the President is a "unitary executive."

A lively debate among legal academics concerns whether a President may authoritatively direct agencies to act in particular ways. The outline of this debate is now familiar. Proponents of the so-called unitary executive argue that the constitutional grant of "[t]he executive Power" to "a President,"¹⁶⁰ combined with its charge to the singular President that he "take Care that the Laws be faithfully executed"¹⁶¹ means that agencies exercising executive authority may do so only subject to presidential preferences.¹⁶² Their interlocutors insist that, after entertaining presidential input, agencies are the authoritative "deciders" in their own realm.¹⁶³ They argue that the President executes "the Laws," which are defined by the Congress, and that a congressional delegation to an agency is "part of the law whose faithful execution the President is to assure."¹⁶⁴ These scholars understand the vesting clause to "hedge[]," in Richard Nathan's phrase, with respect to the extent of presidential power over bureaucrats.¹⁶⁵ Their position is that although the President surely wields *some* inviolable authority over executive departments,¹⁶⁶ the extent of that authority can be substantially limited by the Congress.¹⁶⁷

Disagreement over the extent to which the Congress, a coordinate branch, may delegate the "executive Power" to persons other than the President has obvious implications for how properly to conceptualize delegation of power within the constitutionally-defined executive. To begin, both the unitarians and their interlocutors agree that persons other than the President may exercise executive power. For non-unitarians, this is the whole point. But advocates of the unitary executive also do not contest the observation in *Myers v. United States*¹⁶⁸ "that the natural meaning of the term 'executive power'" includes delegation.¹⁶⁹ "[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of

160. U.S. CONST. art. II, § 1, cl. 1 (emphasis added) (the "Vesting Clause").

161. *Id.* art. II, § 3, cl. 1 (the "Take Care Clause").

162. See DeMuth & Ginsburg, *White House Review*, *supra* note 32, at 1083; Kagan, *supra* note 43, at 2325 n.314 (reviewing literature); Verkuil, *supra* note 41, at 957.

163. See Kagan, *supra* note 43, at 2289 (characterizing this view as one that allows the President to "issue only an advisory opinion"); Kevin M. Stack, *The President's Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 299 (2006) ("[S]imple delegations to agency officials d[o] not . . . extend[] directive authority to the President by implication."); Peter L. Strauss, *Overseer, or "The Decider"?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 759–60 (2007) (concluding that "in the ordinary world of domestic administration" agencies have decisional authority and the President may exercise only "oversight").

164. Strauss, *supra* note 163, at 759–60.

165. NATHAN, *supra* note 69, at 2.

166. See, e.g., HAROLD J. KRENT, PRESIDENTIAL POWERS 69 (2005); Strauss, *supra* note 14, at 641, 648–49.

167. See, e.g., KRENT, *supra* note 166, at 69; Kagan, *supra* note 43, at 2328.

168. 272 U.S. 52 (1926).

169. *Id.* at 117.

subordinates.”¹⁷⁰ No sensible person contests the validity of the *Myers* observation. It is (and has always been, long before the rise of the administrative state) structurally impossible for one person to execute the laws of the vast and complex leviathan that is the United States.¹⁷¹ This reality was clearly evident to the Framers, who refer to “Heads of Departments”¹⁷² and to “principal” and “inferior Officers” of the United States.¹⁷³

That the Constitution recognizes distinctions among executive officials¹⁷⁴ does not perturb the unitarian argument that when a person other than the President exercises executive power, that person is *assisting* the President.¹⁷⁵ The argument suggests that there should be no distinction, with respect to presidential power, between *Myers*’s observation that the President needs “assistan[ts]” to help manage the country¹⁷⁶ and the plea of the Brownlow Commission, advocating the creation of the Executive Office of the President, that the “President needs help” within the White House.¹⁷⁷ Both sorts of presidential agents—agency people and White House staff—are “assistants.” For unitarians, the executive branch is the same as Polsby’s “presidential branch”;¹⁷⁸ or, more precisely, if it isn’t, it ought to be.¹⁷⁹

Nevertheless one sometimes finds, among those friendly to unitarian thinking, suggestions that presidential *staff*, as distinguished from agencies—what Eric Posner and Adrian Vermeule call “the presidential

170. *Id.*; accord Strauss, *supra* note 14, at 602 (The Constitution assumes that “[t]he responsibility of government was to be focally [the president’s]; but day-to-day administration and decision, of necessity, was to be entrusted to the hands of others.”).

171. President George Washington “looked upon the [Cabinet] secretaries . . . as assistants, not as rivals or substitutes.” Bailey, *supra* note 55, at 26 (quoting LEONARD D. WHITE, *THE FEDERALISTS* 27 (1948)).

172. U.S. CONST. art. II, § 2, cl. 2.

173. *Id.* art. II, § 2, cl. 1–2; cf. Strauss, *supra* note 14, at 600 (characterizing these and other clauses as “shadowy references to executive departments”).

174. The President may require opinions in writing from “the principal Officer in each of the executive Departments,” U.S. CONST. art. II, § 2, cl. 1; and “Heads of Departments” may, at the discretion of Congress, appoint “inferior Officers” but not “principal” ones, *id.* art. II, § 2, cl. 2.

175. Many non-unitarians also of course agree that agency heads, in some contexts, should be understood to be pure agents of the President. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 762 (1986) (White, J., dissenting) (“[T]here are undoubtedly executive functions that, regardless of the enactments of Congress, must be performed by officers subject to removal at will by the President.”).

176. *Myers v. United States*, 272 U.S. 52, 117 (1926).

177. PRESIDENT’S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 5 (1937).

178. See *supra* note 33 and accompanying text.

179. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) (“In its pursuit of a ‘workable government,’ Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.”). Even if you are the Chief Justice of the United States, however, wishing does not make it so; and “cajoler-in-chief” is not a bad positive description of the President’s job. See *infra* notes 204–85 and accompanying text.

apparatus"¹⁸⁰—should be treated as if they were part of a unitary *institution* called the “Presidency,”¹⁸¹ which wields the executive power. It is not acceptable, Justice Scalia suggests in *Morrison v. Olson*,¹⁸² to “weake[n] the Presidency by reducing the zeal of his staff.”¹⁸³ In a revealing anthropomorphization, Scalia refers to the institutional “Presidency” with a personal pronoun (“his”). Similarly, in many quarters President Obama’s multiplication of czars has been associated with a unitary-executive or “presidentialist” posture¹⁸⁴—an association that Obama’s April 2011 invocation of the separation of powers with respect to czars encourages.¹⁸⁵

However, the claim that the President may, without congressional or judicial interference, deputize agents on his staff to wield executive power on his behalf just as he could wield it himself is poorly supported by a unitarian reading of the Constitution. It is a claim conceptually distinct, and not derivable from, the proposition that the President himself must be allowed to exercise the executive power free of interference from other branches.¹⁸⁶

This is best seen by comparing the acceptance of intrabran­ch delegation of executive power to the rejection of intrabran­ch delegation of legislative power. On this latter point, Justice Stevens cited *INS v. Chadha*¹⁸⁷:

[W]hen Congress, or a component or an agent of Congress, seeks to make policy that will bind the Nation, it must follow the procedures mandated by Article I of the Constitution—through passage by both Houses and presentment to the President. In short, Congress may not exercise its fundamental power to formulate national policy by delegating that power to one of its two Houses, to a legislative committee, or to an individual agent of the Congress¹⁸⁸

180. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 6 (2010).

181. *Cf.* Kagan, *supra* note 43, at 2338 (noting that her (nonunitarian) arguments are essentially unaffected by the President’s being “a more nearly institutional actor—the President *and* his immediate policy advisors in OMB and the White House”); Kitrosser, *supra* note 94, at 1765–66 (discussing unitarian arguments in terms of the powers of “the President or his proxies”).

182. 487 U.S. 654 (1988).

183. *Id.* at 713 (Scalia, J., dissenting) (The “President’s high-level assistants” must be protected from congressional incursion onto executive power; congressional assignment of executive powers to officials outside presidential control “deeply wounds the President, by substantially reducing the President’s ability to protect himself and his staff.”).

184. *See* Coglianesi, *supra* note 46, at 641–42; Steven Menashi, *All the President’s Czars: Obama Emerges as a Champion of the Unitary Executive*, WKLY. STANDARD, Oct. 12, 2009, at 16, 16–17.

185. *See supra* notes 155–158 and accompanying text.

186. *See* Verkuil, *supra* note 41, at 961 (executive privilege may apply to presidential communications with agencies but not to identical communications by presidential staff); *id.* at 984 (restrictions on White House staff greater than those imposed upon the President himself do “not force the President to concede any power under article II”); *id.* at 978–81 (similar).

187. 462 U.S. 919 (1983).

188. *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring in the judgment) (citing *Chadha*, 462 U.S. 919).

Justice Stevens, with the Court, held intrabran­ch delegation of the “fundamental” legislative power to be unconstitutional, even as delegation of some of that same power to agencies is unproblematic.¹⁸⁹

Given that the legislative branch cannot engage in intrabran­ch delegation, there is no reason to think that the executive may do so at its pleasure and without interference, merely because a single individual cannot effectively wield executive power.¹⁹⁰ A bicameral Congress—especially in its contemporary incarnation, choked with partisanship and hamstrung by its own rules—is similarly unable to legislate with sufficient breadth, depth, and competence even to come close to meeting the needs of the nation for statutes and rules. (These are among the chief reasons that the Congress delegates so much quasi-legislative authority to “executive” agencies.¹⁹¹) *Chadha* does not contest that the Congress might find it more difficult to deal with immigration matters through bicameralism and presentment than through intrabran­ch delegation.¹⁹² Rather, it treats the impediments that bicameralism and presentment place in the way of legislative effectiveness as justifying their imposition.¹⁹³ They are intentional limitations on congressional power. Unitarians should understand the unitariness of the President in a parallel way. One person can wield the entirety of the executive power only with great difficulty and partial effectiveness. It is precisely because the President requires subordinates that the vesting of executive power in a single person *limits* the reach of the executive power.¹⁹⁴

To repeat: no one, and certainly not I, thinks that the Constitution prohibits delegation within the executive branch. But I do suggest that the necessity of delegating power to subordinates limits executive power even as it expands its reach. The principal/agent problems associated with delegation are the presidential analogue of collective action in the Congress:

189. *Id.*

190. Nor does presidential participation in lawmaking, through presentment and the possibility of veto, justify forbidding intra-legislative but not intra-executive delegation. Just as the president enters legislative territory when he chooses to sign or to veto, the Congress routinely engages in “executive” business when it organizes, funds, and makes rules that govern the executive apparatus.

191. See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 24–25 (2003); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 394–95 (1989).

192. *Chadha*, 462 U.S. at 944.

193. *Id.* at 958–59 (“In purely practical terms, it is obviously easier for action to be taken by one House without submission to the President; but it is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency.”).

194. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3155–56 (2010) (“The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws. And the ‘fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution, for [c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.’” (alteration in original) (quoting *Bowsher*, 478 U.S. at 736, in turn quoting *Chadha*, 462 U.S. at 944) (some internal quotation marks omitted)).

both are intentional, structural impediments to effectiveness. To grant that the Constitution creates a unitary executive, on any understanding of "unitariness," does not imply that the law should seek always to maximize presidential power over his agents. "Unitary" means neither "powerful" nor "effective."¹⁹⁵ Put differently, unitary executive theory is compatible with the reality of partial estrangement between President and the executive branch, whereby Presidents constantly struggle for power with their imperfectly coupled agents.

Principal/agent problems characterize a President's relationships with his staff just as they do his relationships with agencies.¹⁹⁶ If the Constitution understands officials who manage agencies to be presidential agents, it understands those tasked to manage the managers likewise. If the Constitution, seeking an equilibrium between effective administration and a checked presidency, allows the Congress and the courts to restrict (up to a point) how the President delegates power to his subordinates, the license it extends applies equally to subordinates who work in a "White House Office" and those who work in a line agency.¹⁹⁷ Nonunitarians accept these propositions without hesitation; unitarians should too.

This does not imply that the Congress should not regulate agency and White House staff differently; such distinctions are eminently reasonable in the face of the realities of the contemporary administrative state. But the Constitution does not require the Congress to draw such distinctions.

V. REFORMING THE LAW OF THE WHITE HOUSE STAFF

The policy choice with regard to legislative and judicial interference in the operation of the White House staff is how to craft an equilibrium between an effective executive and effective separation of powers. Because, as I argue in Part II, Obama's czars do shift the equilibrium—by enhancing the President's ability to shape bureaucratic action and by reducing the transparency of presidential action—they provide occasion to consider whether and how legal regulation in this area should shift in turn.

For advocates of presidential power over agency action, of course, the shift is largely welcome and further regulation is unwarranted. But even those who worry about an unbounded executive—either that "White House

195. Cf. Stack, *supra* note 163, at 319 (President's "[p]olitical accountability need not be maximized to be effective").

196. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1307–09 (2006) (OIRA, notwithstanding that it was created to implement presidential preferences, is an agency that "face[s] public choice pressures" and other principal/agent problems); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986) (cited in Bagley & Revesz, *supra*, at 1307) (same); Kagan, *supra* note 43, at 2338 (noting that President's relationship to his staff also suffers from principal/agent problems; otherwise "the newspapers would contain fewer stories about staff disputes in the White House"); *supra* note 71 and accompanying text.

197. See Verkuil, *supra* note 41, at 960 (executive privilege as it applies to presidential advisors must be "separately justified" from the privilege of the President himself).

'czars' sometimes have more power than cabinet secretaries"¹⁹⁸ or only that opacity in the exercise of such power is contrary to sound administrative law and practice¹⁹⁹—will find it difficult to regulate away the power of the czars directly.

Direct regulation is exceedingly hard to operationalize. To see why, consider the limitations of the analogy offered in the previous part between the executive and legislative power. As noted above, the Congress may not delegate its power to make law to "one of its two Houses, to a legislative committee, or to an individual agent of the Congress";²⁰⁰ it must adopt legislation through bicameralism and presentment. This principle obviously does not prevent all, or even most, intrabranched delegations of legislative power. The numerous vetogates that encumber the legislative process, the prerogatives of the leadership in each chamber, the committee structure, and other factors all mean that individuals and groups short of the full Congress can and routinely do alter legislative outcomes.²⁰¹ It would be formalist in the extreme, therefore, to say that intrabranched delegation of legislative power is not permitted; such delegation is normative. But the last step—the formal passage of the bills that are then sent to the President—must adhere to the no-delegation policy. All prior steps, including those delegated to subunits or agents of the Congress, take place in the shadow of the necessity that any new legislation be able to survive bicameralism and presentment.

The executive power, by contrast, has no final, formal step. What, after all, does it mean for the President to "take Care that the Laws be faithfully executed"?²⁰² Even accepting *arguendo* Justice Scalia's claim that some powers, such as prosecution, are entirely and essentially "executive,"²⁰³ most execution of the laws is not embodied in a discretely defined decision such as that to prosecute. Rather, as scholars of the presidency have exhaustively described, to be the chief executive is to engage in multiple, overlapping campaigns of persuasion, cajolery, threats, horsetrades, and

198. ACKERMAN, *supra* note 52, at 34, 40 (describing "presidential unilateralism" as a pressing problem now that "White House staff can create sweeping changes that will be very hard to reverse once they are set in motion"); STRAUSS, *supra* note 163, at 753 (worrying over potential control over agency decisions made by "an apparatus of a few thousand White House employees working . . . out of the reach of the APA and the Freedom of Information Act"); ROZELL & SOLLENBERGER, *supra* note 7 ("[B]y appointing czars, presidents are circumventing the normal process of accountability that depends on Senate confirmation and on appointed senior officials being subject to testimony before Congress.").

199. See STRAUSS, *supra* note 163, at 753 (staff "work[] within the properly protected opacity" of the White House).

200. *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring) (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

201. See WILLIAM N. ESKRIDGE, JR., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008).

202. See STEVEN G. CALABRESI, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 n.47 (1994); M. ELIZABETH MAGILL, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 613 & n.25 (2001) (suggesting that "many formalist commentators" agree with Calabresi that such a definition is difficult to formulate).

203. See *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

hectoring.²⁰⁴ For this reason, the debate described in Part IV, regarding whether a President may coerce an agency head to act in a particular way, has a certain air of unreality. Regardless whether a President *can* issue such an order, a President who must give that order has nearly always lost his battle.²⁰⁵ An effective President gives no commands except when he wants to.²⁰⁶ Far better to persuade. Any regulation of the White House staff in their exercise of executive powers with respect to agencies,²⁰⁷ then, will target powers that are soft and difficult even to identify, much less to regulate, because these are the powers at the core of the Take Care Clause's grant of "the executive power."

Therefore, to the extent that one regards negatively an increased presidential capacity invisibly to assert political control over agencies, a natural response is to try to ratchet up transparency—not just transparency with respect to the Congress, as urged by Byrd and his congressional colleagues,²⁰⁸ but with respect to the public and the courts as well. If the President himself calls the head of an agency, that is an exercise of constitutional, executive power. This should be accepted and even encouraged (unless it violates statutory law or due process rights).²⁰⁹ But this rule need not apply in identical form when the President *delegates* to his staff the power to lobby, hector, and cajole agencies. A delegate, unlike the President himself, might be prohibited from contacting an agency in the President's name without there being a public record of both the fact and the content of the delegate's representation. Or, to revive a more moderate proposal of Paul Verkuil's, this could be the default rule, which could be waived in specific cases by a presidential writing.²¹⁰

Transparency, moreover, is not so much an end in itself as a handmaiden of political accountability²¹¹—another value emphasized by complaining members of Congress. Public access to representations that presidential staff make to agencies in the President's name help make the President accountable for the messages his staff delivers. But accountability can also

204. See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP FROM FDR TO CARTER* 7 (1980) ("widespread" acknowledgement of presidential power "merely signifies that other men have found it practically impossible to do *their* jobs without assurance of initiatives from" the President).

205. See WATERMAN, *supra* note 37, at 2, 25; Kagan, *supra* note 43, at 2298 (presidential "persuasion may be more than persuasion and command may be less than command"); Verkuil, *supra* note 41, at 943 ("[T]he President may have the power to act directly, but he prefers for political reasons to cajole, persuade, or arbitrate.").

206. See NEUSTADT, *supra* note 204, at 27.

207. Importantly, this regime need and should not extend to the president's personal exercise of these powers.

208. See *supra* notes 95–97 and accompanying text.

209. Verkuil, *supra* note 41, at 961–62.

210. *Id.* at 962.

211. See Cary Coglianese, *The Transparency President? The Obama Administration and Open Government*, 22 *GOVERNANCE* 529, 536 (2009); Cary Coglianese, Heather Kilmartin & Evan Mendelson, *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 *GEO. WASH. L. REV.* 924, 927 (2009).

be enhanced more directly. For example, one might argue that because the President's authority to influence agency decisionmaking is part of his constitutional power to "take Care that the Laws be faithfully executed,"²¹² he should be permitted to delegate that power only in ways consistent with 3 U.S.C. § 301, which authorizes the President to delegate "any function which is vested in the President by law" only to "any official . . . who is required to be appointed by and with the advice and consent of the Senate."²¹³ Because the power to execute the laws is at its core a soft power, it is reasonable to read the statute to require that such soft power be exercised only by officials who have undergone advice and consent.

This would leave the "pure" czars of the White House Office, those who lack statutory status and whom the White House Counsel insists are mere "staffers," with unfettered freedom to advise the President,²¹⁴ but without authority to contact agencies on the President's behalf—or even, perhaps, to contact them at all. This would surely push Presidents towards the sort of czars who *are* appointed and subject to advice and consent. This tendency in turn would allow the Congress to prevent, by inaction, the President from creating specific czardoms; to authorize those czardoms it was willing to countenance before they were filled; to consent to the holder of any office so created; and to restrict the ability of that officeholder to operate, including by the imposition of additional transparency requirements.

The appeal of the czar system to President Obama, however, suggests an alternative approach to accountability. Obama wanted to advance ambitious policy agendas with respect to health care, climate, urban affairs, and other matters. His czar appointments demonstrate that he viewed the existing agency structure as inadequate to meet those goals, but at the same time that excessive reliance upon political loyalists would provide him with insufficient substantive expertise. Individuals sympathetic to the proposition that Presidents should be able efficaciously to advance their own domestic policy agendas—regardless whether they take a unitary-executive position—might therefore view Obama's proliferation of domestic policy czars as demonstrating the need to reform not the administrative law that governs czars but the administrative law that governs agencies. Such a person would view proposals like the ones I discuss above as a compounding of earlier mistakes. Such proposals, imposing upon the new bureaucrats of the White House strictures parallel to those that restrict the old bureaucrats of the agencies, even risk the creation of a "fifth branch" as ossified and unresponsive to presidential preferences as the fourth.

Indeed, this has already occurred to a substantial extent with respect to the Executive Office of the President, which within decades of its creation had been largely transformed by the accretion of congressionally-mandated "establishments" from a tool of the presidential management into a semi-

212. U.S. CONST. art. II, § 3, cl. 1.

213. 3 U.S.C. § 301 (2006).

214. *See supra* note 159.

ossified bureaucracy of its own.²¹⁵ This transformation proceeds apace. To similarly regulate the White House Office, that core of the EOP that has so far resisted bureaucratization, would plausibly do no more than relocate the White House Office at today's edge of an indefinite recursive spiral in which the Congress creates bureaucrats, the President seeks agents to manage them, and the Congress transforms those agents into bureaucrats yet again.

Proponents of a strong presidency might seek not only to call a halt, but to effect a partial reversal. Writing prior to Reagan's deregulatory revolution, Graham Allison urged a return to the "executive cabinet" of "heads of department" who would "serv[e] an important function in the presidential decision-making and coordination process, giving the [P]resident both a relatively complete display of the issues before him *and* an opportunity to extend his control throughout the executive bureaucracy."²¹⁶ This position, generalized beyond the regulatory politics of its particular moment, insists that regulation within as well as outside of agencies is inherently political and inherently presidential.²¹⁷

For those who prefer a powerful presidency, this goes without saying.²¹⁸ But those who seek a semi-autonomous fourth branch might profitably resign themselves to it as, in some substantial part, unavoidable. If the czars—this President's version of centralized control of agencies—raise concerns, perhaps the law can best address those concerns by ameliorating the barriers that make political, presidential control of agencies so difficult without them.²¹⁹

Obama's czars, in my view, therefore provide new reasons to embrace then-Professor Kagan's suggestion that presidential preferences, when explicitly expressed, should count as valid evidence for the "reasonableness" of regulations, without any requirement that the President's own reasons be reasonable or even explicitly justified.²²⁰ Such evidence could be "transparent" in the sense that an agency would have to

215. See Bailey, *supra* note 55, at 31–32, 35; see also *supra* notes 23–26, 122–24, 131–32 and accompanying text (describing the bureaucratization of the EOP).

216. Allison, *supra* note 22, at 41.

217. Nearly everyone now agrees that regulation within agencies constitutes at least in substantial part the exercise of political discretion. See, e.g., Strauss, *supra* note 42, at 1359–60 (citing, inter alia, CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 169–206 (1990)).

218. DeMuth & Ginsburg, *White House Review*, *supra* note 32, at 1083 (advocating regulatory structures that "advance generally the set of policies (or just 'attitudes') that brought the president to the head of the government").

219. See generally Barron, *supra* note 19 (contrasting presidential strategies of centralization and politicization with respect to agencies).

220. See Kagan, *supra* note 43, at 2380. This is the weak version of Kagan's suggestion; a stronger version proposes that courts apply *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "only when . . . presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes." Kagan, *supra* note 43, at 2377 (emphasis added). Note also that Kagan is explicit in her understanding of "presidential involvement" as being that of the "President and his immediate staff." *Id.*

disclose which parts of its decisions were based upon the President's preferences, but opaque in that the President's reasons would themselves require no justification.²²¹ This kind of procedural transparency, combined with substantive opacity, is sympathetic to the view that the President is a politician and that regulation is political. Moreover, a purely procedural transparency still serves political accountability.²²² As Kagan writes, "presidential leadership enhances transparency, enabling the public to comprehend more accurately the sources and nature of bureaucratic power. . . . The Presidency's unitary power structure, its visibility, and its 'personality' all render the office peculiarly apt to exercise power [over the bureaucracy] in ways that the public can understand and evaluate."²²³

Such an approach treats the President's regulatory preferences more like the preferences of the Congress. The Congress need not justify its regulatory statutes on any basis beyond constitutional rational-basis review nor justify its regulatory budgets on any basis whatsoever. The Congress controls regulatory action in light of its members' political calculations, even when base or illogical. Presidents might be allowed to do the same.

Such a proposal raises legitimate concerns. It strengthens the President with respect to both the Congress and the courts. In particular, it creates both incentives and means for agencies to evade meaningful judicial review of reasonableness, by citing presidential desires.²²⁴ But, for practical reasons, the proposal should not be entirely unattractive even to those who normatively oppose the additional empowerment of the President with respect to the agencies. The history of the "presidential branch,"²²⁵ and the case of Obama's domestic policy czars in particular, together suggest that Presidents already have very substantial power over the agencies—but that they now resort to elaborate dances to get the results that administrative law's overreliance on reasonableness and underappreciation for politics deny them directly. The elaborate two-step of the czardoms results in incomplete, but still substantial, political control, and also very substantial opacity. Perhaps more direct control, with procedural transparency, would be a better bargain. A robust norm of procedural transparency regarding agency/presidential contact would also mitigate, if only partially, the judicial review problem.

221. See Kagan, *supra* note 43, at 2382.

222. See Bressman & Vandenberg, *supra* note 143, at 94 ("[T]ransparency and responsiveness should be taken as entitling voters to understand the actual basis for agency decision-making and to evaluate whether such decision-making represents their interests. Thus, the public should have knowledge of precisely who among those clamoring for credit (including the agency) are responsible for particular policies. They also should have the information necessary to understand how the White House offices relate to each other as well as to the president, OIRA, and other federal agencies.").

223. Kagan, *supra* note 43, at 2331–32; see also *id.* at 2337 ("It is when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment.").

224. See Stack, *supra* note 163, at 307.

225. Polsby, *supra* note 33, at 20.

This approach is consistent simultaneously with a strong unitary-executive position, with the opposing position that endorses a polyarchic executive, and with various intermediate views. As Kagan notes, to allow presidential preferences, even those that cannot be rationally justified, to serve as *a* justification for agency action is not the same as asserting that Presidents may displace agency decisionmaking at will.²²⁶ An agency could still be charged with the duty of weighing the fact of a presidential preference for *x* against the arguments in the record that favor *not-x*, choosing between the two as a Straussian “decider,” and then explaining, for the benefit of the Congress, the public, and possibly a reviewing court, why it chose in a particular instance to accord the weight it did to the desires of the President. A court could plausibly find it irrational and therefore illegal, in the face of a record overwhelmingly in favor of *not-x*, for an agency to have credited presidential preferences for *x*; such a determination would depend on the particular case. This approach provides only that agencies ought to be *allowed* to take into account, explicitly and transparently, nakedly political presidential preferences.²²⁷ Whether and to what extent they *should* would continue to depend, both on one’s policy preferences regarding the regulatory question at issue and, more generally, on one’s position in the unitary-executive debate.

Under such a regime, a President might very well still seek advice on climate from someone other than the EPA Administrator, and on health from someone other than the HHS secretary. Presidents will, as they should, continue to seek and to benefit from diverse perspectives. But such a President would be much more likely to make policy about climate and health in conjunction with, rather than in opposition to—“*across the table from,*” in Polsby’s phrase—his agency appointees.²²⁸ Agencies would still be subject to capture, but the President would be better equipped, when the need arose, to capture them back. He would have reason to hope that they would take his direction and help him shape a program in a way that would reliably further his, as well as their own, interests. At the same time, agency heads would also, unlike presidential staff, remain officers of the United States, empowered to turn a presidential program into reality. Indeed, a President under these circumstances might even choose to provide some key agency heads with offices in the West Wing—without his or their wanting also to appoint them to lead “Offices” within the White House bureaucracy.

226. See Kagan, *supra* note 43, at 2382.

227. This approach is responsive to language in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that justifies judicial deference to agencies only for statutes that agencies “administer.” See Stack, *supra* note 163, at 306–07. Agencies would exercise their own judgment and expertise to give the appropriate weight to a president’s political preferences.

228. Polsby, *supra* note 33, at 20.