

**PRESIDENTIAL CONTROL OF ADMINISTRATIVE AGENCIES:
A DEBATE OVER LAW OR POLITICS?**

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In their recent book documenting presidential assertions of authority, *The Unitary Executive: Presidential Power from Washington to Bush*, Professors Steven Calabresi and Christopher Yoo argue that presidential practice throughout American history supports the view that the “Constitution gives presidents the power to control their subordinates.”¹ Published in the closing year of the administration of George W. Bush, *The Unitary Executive* appeared at a time of considerable scholarly and political criticism of President Bush for his efforts to direct the actions of federal administrative agencies. To some, Bush’s efforts to influence the decisions of political appointees heading executive branch agencies “crossed the line” between permissible and impermissible efforts to control agency officials exercising authority delegated directly to them rather than to the President.² Calabresi and Yoo show that the kinds of actions Bush took, as well as the kinds of criticisms he received, are far from new in American history. To the contrary, they assert that the debate over presidential authority of the executive branch is the “oldest . . . debate[] in constitutional law.”³

From the vantage point of President Obama’s first year in office, we can safely conclude that this debate did not end with the departure of President Bush. Despite the current President’s efforts to distance his administration’s style and rhetoric from that of his predecessor’s, Obama has nevertheless taken steps much like his predecessors’ to ensure that executive branch agencies act in ways consistent with his priorities. Given the longstanding historical prac-

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1 STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 4 (2008) [hereinafter CALABRESI & YOO]; see also *id.* at 420–27.

2 Peter L. Strauss, *Overseer or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 700–02 (2007).

3 CALABRESI & YOO, *supra* note 1, at 3.

tices chronicled by Calabresi and Yoo, no one should find it surprising that President Obama has exhibited strong presidentialist tendencies even in his earliest days in office. Yet so far Obama's efforts to influence administrative agencies have tended to escape criticism from many of the same quarters critical of similar efforts by President Bush. Of course, this too is hardly surprising. Democrats can be expected to be more critical of the exercise of presidential power by Republican Presidents, and vice versa.

Such a pattern of criticism raises the question of whether the longstanding debate about presidential authority over executive branch agencies is less a debate over American constitutional law than a debate over American politics. After all, the purported constitutional line between permissible and impermissible involvement of Presidents in administrative agency decision-making—a line Professor Peter Strauss has labeled as one between “overseer” and “decider”⁴—is so murky and imperceptible that this distinction seems incapable of providing a constraining legal principle at all. Rather than offering a legal constraint, those who argue that the Constitution creates such a line over the exercise of presidential power seem to offer little more than another rhetorical arrow to be flung by political partisans when it suits their purposes.

OBAMA AS PRESIDENTIALIST

Despite emphasizing “change” as the main theme of his successful campaign, President Obama's early actions indicate that his administration will remain basically unchanged from its predecessors in at least one respect: its assertion of presidential influence over domestic policy decisions by executive branch agencies. Even in the opening weeks of the Obama Administration, the new President showed determination to use his authority to shape the direction of executive branch agencies' making and implementation of public policy.

Not only did President Obama move swiftly to appoint heads of key cabinet departments, but he also appointed a significant number of White House “czars,” or policy advisors, to oversee policymaking on priority issues from health care reform and economic policy to climate change and energy. The President appointed some of these advisors alone, without Senate confirmation, and these czars work expressly to “ensure that policymakers across the executive branch

⁴ Strauss, *supra* note 2.

work toward the President's . . . agenda."⁵ President Obama also appointed as his Solicitor General and Administrator of the White House Office of Information and Regulatory Affairs (OIRA) prominent scholars who have written strong defenses of presidential authority over domestic policymaking.⁶

On his very first day in office, President Obama issued a presidential memorandum on transparency and open government that proved distinctive in the way that it asserted authority over independent agencies.⁷ President Obama wrote that "[t]he independent agencies should comply with the Open Government Directive,"⁸ using the same verb—"should"—that the memo used for executive branch agencies. Granted, the significance of this choice of language may not be self-evident; but interestingly, previous Presidents have made a point to distinguish a softer application of their presidential directives to independent agencies than to executive branch agencies. For example, President Bush only "requested" independent agencies to comply with his governmental reform memorandum,⁹ and President Clinton "asked," "encouraged," and "requested" independent agencies to comply with his directives.¹⁰ President Obama appears prepared to go farther than previous Presidents have in overseeing independent agencies.

Like his predecessors, President Obama also has taken steps that "convey the impression that [he is] personally responsible for the conduct of domestic governance."¹¹ Within his first week in office, for

⁵ Exec. Order No. 13,507, 74 Fed. Reg. 17,071 (Apr. 8, 2009).

⁶ Solicitor General Elena Kagan has written a leading article in defense of presidential authority over executive branch agencies. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). OIRA Administrator Cass Sunstein has advocated applying White House review of regulations to independent agencies. See, e.g., Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 500 (1987) (describing "increased presidential control of all regulatory agencies"—including independent agencies—as "highly desirable").

⁷ Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009). By "independent agencies," of course, the memorandum means those agencies headed by officials not subject to at-will removal by the President.

⁸ *Id.*

⁹ Memorandum on Implementing Government Reform, 37 WEEKLY COMP. PRES. DOC. 28 (July 16, 2001) ("Independent agencies are requested to comply with this memorandum.").

¹⁰ See, e.g., Federalism, 64 Fed. Reg. 43,255 (Aug. 4, 1999) ("Independent regulatory agencies are encouraged to comply with the provisions of this order."); Plain Language in Government Writing, 63 Fed. Reg. 31,885 (June 1, 1998) ("I ask the independent agencies to comply with these directives."); Memorandum on Implementing Management Reform in the Executive Branch, 58 Fed. Reg. 52,393 (Oct. 1, 1993) ("Independent agencies are requested to adhere to this directive.").

¹¹ Strauss, *supra* note 2, at 702.

example, he announced a “new direction” in national energy policy, including making the commitment that “[w]e will start by implementing new standards for model year 2011 so that we use less oil and families have access to cleaner, more efficient cars and trucks.”¹² At the same time, he stated he was “directing the Environmental Protection Agency to immediately review the [Bush Administration’s] denial of the California waiver request,”¹³ a denial which prohibited California under the Clean Air Act from adopting new automobile emissions on greenhouse gases.¹⁴

Later in the spring of 2009, the White House publicly announced a rulemaking proceeding jointly undertaken by the Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA).¹⁵ According to the White House announcement, “President Obama today—for the first time in history—set in motion a new national policy aimed at both increasing fuel economy and reducing greenhouse gas pollution for all new cars and trucks sold in the United States.”¹⁶ That same announcement quoted EPA Administrator Lisa Jackson as crediting President Obama with having “brought all stakeholders to the table and [come] up with a plan to help the auto industry, safeguard consumers, and protect human health and the environment.”¹⁷ A separate “regulatory announcement” issued by the EPA made clear that the agency was carrying out “the President’s policy.”¹⁸

In another policy domain, President Obama publicly declared in June 2009 his administration’s commitment to ending the agency-

12 Remarks on Energy, WEEKLY COMP. PRES. DOC. 1 (Jan. 26, 2009); *see also* Memorandum on the Energy Independence and Security Act of 2007, WEEKLY COMP. PRES. DOC. 1 (Jan. 26, 2009).

13 Remarks on Energy, *supra* note 12.

14 For Obama’s order to the EPA, see Memorandum for the Administrator of the Environmental Protection Agency, 74 Fed. Reg. 4905 (Jan. 26, 2009).

15 74 Fed. Reg. 24,007 (May 22, 2009). The White House press office announced the decision to initiate a rulemaking before the agencies did, making clear that “the agencies and the White House worked closely . . . in developing this historic proposal.” Press Background Briefing, Office of the Press Sec’y, White House, White House Announcement on Auto Emissions and Efficiency Standards (May 18, 2009), *available at* http://www.whitehouse.gov/the_press_office/Background-Briefing-on-Auto-Emissions-and-Efficiency-Standards.

16 Press Release, Office of the Press Sec’y, White House, President Obama Announces National Fuel Efficiency Policy, 2009 WL 1388410 (May 19, 2009), *available at* http://www.whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy.

17 *Id.*

18 Regulatory Announcement, U.S. Env’tl. Prot. Agency Office of Transp. & Air Quality, EPA Will Propose Historic Greenhouse Gas Emissions Standards for Light-Duty Vehicles (May 2009), *available at* <http://www.epa.gov/otaq/climate/regulations/420f09028.pdf>.

imposed ban prohibiting HIV-positive individuals from entering the United States, noting that his White House was making “a first and very big step towards ending this policy.”¹⁹ Although the Department of Health and Human Services’ final rule lifting the entry ban did not appear in the *Federal Register* until November 2, 2009,²⁰ President Obama made a point to announce the final rule himself in a public appearance on October 30, 2009.²¹

REACTIONS TO BUSH AND OBAMA DIRECTIVES

At least at this early juncture, the Obama Administration has signaled little retreat from the same kinds of assertions of presidential influence over administrative agencies that previous administrations have made. To date, what criticism President Obama has received for exercising presidential power over agencies has centered mainly on his appointment of numerous policy “czars.”²² Although most of this criticism predictably has come from the political right,²³ at least a few Democratic members of Congress have raised questions as well.²⁴ The White House’s response to these concerns has been to emphasize that Obama’s presidential advisors do not “supplant or replace” administrative agencies but instead (merely) “help coordinate their efforts and help devise comprehensive solutions to complex prob-

19 President Barack Obama, Remarks by the President at LGBT Pride Month Reception, White House (June 29, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-LGBT-Pride-Month-Reception/.

20 Medical Examination of Aliens—Removal of Human Immunodeficiency Virus (HIV) from Definition of Communicable Disease of Public Health Significance, 74 Fed. Reg. 56,547 (Nov. 2, 2009).

21 President Barack Obama, Remarks by the President at Signing of the Ryan White HIV/AIDS Treatment Extension Act of 2009, White House (Oct. 30, 2009), *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-signing-ryan-white-hiv-aids-treatment-extension-act-2009>.

22 *See, e.g.*, Tom Hamburger & Christi Parsons, *White House Czar Inflation Stirs Concern*, L.A. TIMES, Mar. 5, 2009, at A1. The conservative activist group Judicial Watch has placed President Obama on its list of “most corrupt” politicians in part over the number of special White House policy advisors. Tom Fitton, Judicial Watch Announces List of Washington’s “Ten Most Wanted Corrupt Politicians” for 2009, <http://www.judicialwatch.org/weeklyupdate/2010/53-dcs-ten-most-wanted-corrupt-politicians-2009> (last visited Jan. 29, 2010).

23 John McCain has quipped, “Obama has more czars than the Romanovs . . .” John McCain, Twitter, <http://twitter.com/SenJohnMcCain/status/1972425520> (last visited Jan. 29, 2010).

24 Senators Robert Byrd and Russell Feingold have publicly raised questions about Obama’s czars. *See, e.g.*, Manu Raju, *Democrats Join GOP Czar Wars*, POLITICO, Sept. 17, 2009, *available at* <http://www.politico.com/news/stories/0909/27265.html>.

lems.”²⁵ Borrowing the logic found in Calabresi and Yoo’s recent book, the White House has stressed that “[e]very President has structured his staff in this manner This is, and *always has been*, the traditional role of White House staff.”²⁶

Other than the issue of policy czars, the reaction to the Obama Administration’s presidentialist tendencies so far has been remarkably muted, at least in comparison with the controversy that surrounded the Bush Administration when it took similar actions. The contrast in reactions to the two administrations suggests that at base politics motivates even supposedly legal debates over the President’s power to control administrative agencies.

The Bush Administration, for example, garnered intense criticism when its EPA denied the State of California’s request for a waiver under the Clean Air Act to adopt automobile emissions standards for greenhouse gases. Ordinarily, automobile emissions standards are imposed by the federal EPA and apply nationally, but the Clean Air Act allows the EPA to grant California a waiver to adopt emissions standards that differ from federal ones.²⁷ In 2004, California took steps to impose greenhouse gas emissions standards for cars sold in the state.²⁸ No federal greenhouse gas emissions standards existed at the time, so California applied for a waiver which the EPA needed to grant before the state standards could take effect.²⁹ The Act requires the EPA to grant such a waiver request unless the agency specifically finds that, among other things, California “does not need such standards to meet compelling and extraordinary conditions.”³⁰ The EPA has generally approved these waivers in the past for other air pollutants,³¹ and the EPA’s career staff recommended to President Bush’s EPA Administrator, Stephen Johnson, that he grant the greenhouse

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

26 *Id.* (emphasis in original).

27 42 U.S.C. § 7543 (2009).

28 Letter from Catherine Witherspoon, Executive Officer, Cal. Air Res. Bd., to Stephen L. Johnson, EPA Administrator, Attachment 2 (Dec. 21, 2005), *available at* <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OAR-2006-0173-0004.1> (requesting a waiver of pre-emption for greenhouse gas regulations).

29 Letter from Catherine Witherspoon, Executive Officer, Cal. Air Res. Bd., to Stephen L. Johnson, EPA Administrator (Dec. 21, 2005) *available at* <http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&d=EPA-HQ-OAR-2006-0173-0017>.

30 42 U.S.C. § 7543(b) (2009).

31 JAMES E. MCCARTHY & ROBERT MELTZ, CRS REPORT FOR CONGRESS: CALIFORNIA’S WAIVER REQUEST TO CONTROL GREENHOUSE GASES UNDER THE CLEAN AIR ACT 11–12 (2007), *available at* <http://www.ncseonline.org/NLE/CRSreports/07Oct/RL34099.pdf>.

gas waiver request.³² Johnson apparently even gave some indications to his staff that he was inclined to grant the request.³³

After interactions with OIRA—and perhaps even with President Bush himself—Johnson announced in December 2007 that the EPA would deny California’s waiver request.³⁴ He argued that any climate change resulting from greenhouse gas emissions would affect every state and, as such, that California failed to demonstrate that it would suffer “extraordinary” conditions meriting special standards.³⁵ The political reaction to the EPA’s denial was swift and vehement. One powerful member of Congress, Representative Henry Waxman (D-California) conducted hearings, requested thousands of pages of EPA and White House documents, and leveled heated accusations at EPA Administrator Johnson for improperly submitting to presidential influence. As Waxman said to Johnson in one hearing:

And then you reversed yourself after you had a candid conversation with the White House . . . [So] that would indicate you are getting input from the President, which you may think is important.

But it also may indicate that the President is really making the decisions. What we need to do our oversight job is to find out on what basis he is telling you that you ought to make a different decision than what you initially proposed.

. . . .

The law does not provide that this is the president’s decision. So this is your decision.³⁶

Johnson did testify to Congress that he in fact made the final decisions about EPA policies, but he also refused to disclose what, if anything, President Bush might have said to him.³⁷

As already noted, shortly upon assuming office in January 2009, President Obama took a direct interest in the EPA’s handling of the California waiver request and instructed the agency to revisit its denial.³⁸ Of course, President Obama’s memorandum directing the

³² Memorandum from the Majority Staff, Comm. on Oversight and Gov’t Reform, to Members of the Comm. on Oversight and Gov’t Reform, U.S. House of Representatives 1 (May 19, 2008).

³³ *Id.* at 2.

³⁴ Letter from Stephen L. Johnson, EPA Administrator, to Arnold Schwarzenegger, Governor of Cal. (Dec. 19, 2007), *available at* <http://www.epa.gov/otaq/climate/20071219-slj.pdf>.

³⁵ California State Motor Vehicle Pollution Control Standards, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

³⁶ *EPA’s New Ozone Standards: Hearing Before the Oversight and Government Reform Comm.*, 110th Cong. 146 (2008) [hereinafter *Hearings*].

³⁷ *Id.* at 137.

³⁸ *See supra* note 13 and accompanying text.

agency was careful not to tell the EPA that it must reverse itself and grant California's waiver request; instead it simply directed the agency to revisit the issue and take appropriate action. There was no doubt, however, that Obama wanted the waiver granted. He had said as much on the campaign trail, and he promised after his election to take a bold new stance on climate change.³⁹ In the speech in which he announced his directive to EPA, President Obama said:

[T]he federal government must work with, not against, states to reduce greenhouse gas emissions. California has shown bold and bipartisan leadership through its effort to forge 21st century standards But instead of serving as a partner, Washington stood in [the] way. . . .

The days of Washington dragging its heels are over. . . . And that's why I'm directing the Environmental Protection Agency to immediately review the denial of the California waiver request and determine the best way forward. This will help us create incentives to develop new energy that will make us less dependent on oil that endangers our security, our economy, and our planet.⁴⁰

It is hard to imagine anyone being unsure of what the President wanted his appointee as the head of the EPA to do.

Interestingly, instead of receiving criticism for interfering in the business of the EPA, Obama reaped praise from those who had been critical of the Bush Administration. Representative Waxman apparently forgot that he previously claimed the decision was not for the President but for the EPA Administrator to make. Lauding the President for his directive to EPA, Waxman stated, "This is a tremendous and long overdue step for energy independence and the environment. President Obama is taking the nation in a decisive new direction that will receive broad support across the country."⁴¹

What distinguishes the Obama Administration's handling of the California waiver request from the Bush Administration's? It is not that one President attempted to influence an agency's policy and the other did not, nor is it that one President effectively directed agency

³⁹ See, e.g., Thomas D. Elias, *Obama Embraces Arnold's Greenhouse Standards*, SAN JOSE MERCURY NEWS, Nov. 26, 2008; Samantha Young, *Schwarzenegger Opens Climate Summit with Obama*, ASSOCIATED PRESS, Nov. 18, 2008; Barack Obama and Joe Biden: New Energy for America Plan, available at http://www.barackobama.com/pdf/factsheet_energy_speech_080308.pdf.

⁴⁰ Remarks on Energy, *supra* note 12.

⁴¹ Representative Henry A. Waxman, Chairman Waxman Commends President Obama's Action on California Waiver, <http://waxman.house.gov/News/DocumentSingle.aspx?DocumentID=111753> (last visited Jan. 29, 2010).

policy and the other did not. Rather, the major difference lies in the policy outcomes between the two administrations.⁴²

THE DEBATE OVER PRESIDENTIAL POWER: LAW OR POLITICS?

Judgments about policy outcomes not surprisingly affect judgments about presidential power. Recent debates over presidential involvement in administrative policymaking undoubtedly have been influenced by, if not infused with, political ideology. The question arises, then, whether the “oldest debate in constitutional law” is really a debate about law at all. Although partisans invoke the Constitution to bolster their claims, ultimately politics underlies criticisms of Presidents for exercising too much power over administrative agencies. This is not to deny the importance of law more generally in the administrative state. Rather, it is to say that the supposed constitutional rule limiting Presidents to mere oversight of agencies is incapable of neutrally circumscribing either presidential or administrative behavior.

The purported legal rule at issue distinguishes between presidential influence (or oversight) and presidential control (or decision), the former being permissible and the latter not.⁴³ The rule is premised on the delegation of authority by Congress to agencies rather than to Presidents. When an agency possesses delegated authority under a statute, agency heads—and not the President—must be the ultimate deciders of domestic policy made under authority of that statute. Yet even under this view, a President can still oversee what agencies do. The President, as the head of the executive branch, may lawfully try to influence agencies’ actions and can even remove the head of an agency who does not follow the President’s wishes.

Unfortunately, any theoretical difference between influence and control, or between oversight and decision, will not be observed in practice. It is not just that, like with many legal rules, there will be

⁴² It could possibly be argued that what explains the differences in reaction to the two administrations was that Obama has been open about his directives to the EPA, whereas President Bush was secretive. But everyone knows that EPA decisions go to the White House for review, so it never was any secret that the Bush White House was involved in EPA matters. Presumably the only plausible objection to secrecy in communications between President Bush and the EPA Administrator is that President Bush may have said something nefarious to convince Administrator Johnson to deny California’s waiver request. Probably a strong correlation exists between that kind of fear and one’s policy preferences, such that it is still safe to conclude that the meaningful difference in reactions to Bush and Obama stems from observers’ views about the outcomes of each EPA’s proceedings.

⁴³ For a recent formulation and defense of this rule, see Strauss, *supra* note 2.

hard cases or a gray area between the two extremes of lawful and unlawful. Rather, the two extremes themselves are, practically speaking, indistinguishable. One person's "oversight" will be another person's "decision." The supposed constraining principle on presidential directive authority actually provides nothing but another political argument that can be leveled against a President whose policy outcomes a critic opposes.

The purported legal rule also does nothing to prevent a President from exercising the strongest possible control over an agency: namely, placing a clone in the position of agency head. The rule is never even implicated when a President appoints an administrator who agrees with the President. In all likelihood, President Obama's choice for EPA Administrator already agreed that the EPA should grant the California waiver request. If she reversed the EPA's earlier decision even absent any presidential communication, President Obama's control would have been at its apex and yet he also would have done nothing to trigger the purported constitutional rule.

We can envision, of course, other cases where an administrator does not initially agree with the President but nevertheless eventually acquiesces. Even in such cases, will anyone ever truly know for sure how much the President controlled the outcome? Given their vulnerability to congressional oversight and political criticism (if not purported legal objections), administrators who decide to act as "good soldiers" for their Presidents know they not only need to follow orders but they must not admit they are doing so. Thus we find Stephen Johnson, Bush's EPA Administrator, responding to Representative Waxman:

I know that the chairman and other members of the committee disagree with my decision and I understand that. It's—these decisions are not easy decisions, but I made the right decision. I made the decision based upon the facts, based upon the law, what the law directs me to and I stand by that and it was my decision and my decision alone.⁴⁴

Administrators can always claim their decisions were their decisions alone. They can do this in part because of the protective secrecy of White House deliberations. They also can do this because of the necessity that administrators be the individuals formally taking action, given statutes authorizing only the administrator to do so. At the end of the day, only the administrator's signature appears on an administrative rule or order, so in that formal sense it will always be possible to say that a decision was an administrator's alone.

⁴⁴ See *Hearings*, *supra* note 36, at 145.

For these same reasons, Presidents can recite that their administrators make the ultimate decisions. Despite its otherwise presidentialist tendencies, for example, the Obama White House has used language respectful of administrative agencies' decisional authority. In responding to a controversial decision to open a criminal investigation into certain Central Intelligence Agency's interrogation tactics, President Obama made a point to state, "I want to make sure that as president of the United States that I'm not asserting in some way that my decisions overrule the decisions of prosecutors who are there to uphold the law."⁴⁵ Similarly, in responding to questions about the administration's handling of an attempted airline bombing on December 25, 2009, White House Press Secretary Robert Gibbs made a point to note that President Obama's Attorney General made the final decision:

Q: [W]ho made the decision to try [the suspect] in federal court? Was the President aware of this decision when he began being processed in the legal system?

MR. GIBBS: Well, again, understand that the decision to try him was handed down in an indictment that I think took place many days afterward. So, yes, all the team was involved in that.

....

Q: And who made the decision to try him in federal court? Did the President make that call?

MR. GIBBS: I believe that decision is made by the Attorney General.⁴⁶

In cases like these, Presidents may even find it politically expedient to claim distance from the decision at hand, even if they had been centrally involved in making it. Such may well be the case with President Obama.

Of course, some observers may read such statements from the Obama White House to indicate that the current administration respects constitutional limits on presidential directive authority. If that is what should be inferred from these statements, then no necessary conclusion follows that the Obama Administration is special in this respect. The Bush Administration, after all, knew how to use the same kind of language. When asked by the press about the EPA's decision to deny California's waiver request, President Bush's Deputy

⁴⁵ CQ Politics, CQ Transcript: President Obama on CBS's 'Face the Nation', <http://www.cqpolitics.com/wmspage.cfm?docID=news-000003206310> (last visited Jan. 29, 2010).

⁴⁶ Briefing by White House Press Secretary Robert Gibbs and PERAB Chief Economist Austan Goolsbee, Office of the Press Sec'y, White House (Jan. 21, 2010), *available at* <http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-and-perab-chief-economist-austan->

Press Secretary acknowledged that the decision was clearly EPA's to make:

[T]he EPA Administrator made his independent decision on whether to approve or not approve that waiver. He made a decision not to approve the California waiver, and as he explained, I think, he made that based on what he thought was best for the nation in addressing this issue. . . . We support EPA Administrator Johnson's decision, but it was his decision to make.⁴⁷

Such recitations of administrator primacy by both the Bush and Obama Administrations suggest how easy it is for Presidents to adhere formally to a legal distinction between oversight and decision. As long as the ink on signed administrative rules or orders comes from pens controlled by the hands of administrators, Presidents will always be able to claim that their administrators made the final decisions.

To be sure, administrators do face a separate, statutory-based, legal rule that compels them to give reasons for their actions, so as to withstand judicial scrutiny under the arbitrary and capricious test.⁴⁸ Reasons, though, can be constructed. We do not find administrators stating that they took particular actions simply because their career staff told them to do so, although this surely must happen with some frequency. Similarly, we do not see, nor would we expect to see, administrators claiming that they took an action simply because a President told them to do so. Credible or not, administrators and their staffs do manage to come up with reasons.

Those who invoke the Constitution as a basis for a distinction between presidential influence and control, and who then argue that this distinction imposes a limit on presidential power, do at least recognize that the distinction is both "subtle" and unenforceable by courts.⁴⁹ The only way to enforce such a distinction and ensure Presidents never unduly influenced their administrators would be to impose an outright ban on *any* communications between executive branch administrators and the President and White House staff, a response that would be both grossly overbroad and unconstitutional.⁵⁰ As no court, nor anyone else, can peer into the inner workings of administrators' minds, courts will remain unable to enforce a legal limit on presidential authority based on a distinction between influence and control.

47 Press Gaggle, Tony Fratto, Deputy Press Sec'y, White House (Dec. 21, 2007), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/12/20071221-5.html>.

48 5 U.S.C. § 706 (2009).

49 *See* Strauss, *supra* note 2, at 704.

50 By its very terms, the Constitution contemplates communication between agencies and Presidents. U.S. CONST. art. II, § 2.

CONCLUSION

If the constitutional debate over presidential power is defined as one between permissible influence and impermissible control of administrative agencies, the nation appears to have nothing but politics to police this debate. Administrators will always face substantial political reasons to do their President's bidding, and yet for political reasons they also can be expected to continue to deny that anyone but they controlled their decisions. The unobservable nature of the purported constitutional distinction between presidential influence and control not only makes the distinction legally unenforceable, but it also means that partisan critics of any President will continue to be able to invoke the distinction to level accusations of improper entanglement in decisions of administrative agencies. No one, not least the nation's judges, will be able to adjudicate such claims in a consistent manner, untethered from political considerations.

In the end, perhaps politics is exactly where the debate should be left. If no meaningful or practical *legal* constraint exists on presidential directive power, that does not mean that Presidents face no constraints at all—nor that “executive tyranny”⁵¹ will necessarily follow. To policymakers in Washington, whether in the White House or in agencies, political constraints are not trivial. Agency administrators acquiescing to their Presidents still have to contend with the power of unhappy members of Congress who can call administrators to task, override their decisions with legislation, or cut their appropriations. Presidents, too, must contend with objections from these same members of Congress as well as from members of the public, from whom Presidents draw their ultimate legitimacy and their most practically important source of power. When the force of these political constraints is compared with the impact of an asserted legal principle that no court can enforce, it would seem that politics provides the main, if not only, limit on the President's position over the administrative state.

51 See Strauss, *supra* note 2, at 705.