

## PRESIDENTIAL MALADMINISTRATION

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*In Presidential Administration, then-Professor Elena Kagan re-envisioned administrative law through the lens of the President's personal influence on the regulatory state. Rather than grounding Chevron deference on an agency's "special expertise and experience," Kagan would "take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled." The stronger the President's fingerprints on the executive action, a practice she praises as "presidential administration," the more courts should defer.*

*There is a flipside to Kagan's theory: four species of high-level influence, which I describe as "presidential maladministration," are increasingly problematic. First, where an incoming administration reverses a previous administration's interpretation of statute, simply because a new sheriff is in town, courts should verify if the statute bears such a fluid construction. Second, where an administration discovers a heretofore unknown power in a statute that allows it to confer substantive rights, courts should raise a red flag, especially when the authority exercised was one Congress withheld. Third, where an administration declines to enforce a statute that Congress refuses to repeal, under the guise of prosecutorial discretion, courts should view the action with skepticism. Fourth, where evidence exists that the White House attempted to exert its influence and intrude into the rule-making process of independent agencies, courts should revisit the doctrine concerning altered regulatory positions.*

*As the Federal Register has recently turned the page from Obama to Trump, this Article provides a timely analysis of how courts react to un-presided approaches to maladministration.*

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## I. INTRODUCTION

In *Presidential Administration*, then-Professor Elena Kagan re-envisioned administrative law through the lens of the President’s personal influence on the regulatory state.<sup>1</sup> To Kagan, *Chevron* deference should not be grounded primarily on the agency’s “special expertise and experience.”<sup>2</sup> Rather “a sounder version” would “take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.”<sup>3</sup> Under this view, courts should apply a “variable deference regime, dependent on the role of the President in an agency’s interpretive decisionmaking.”<sup>4</sup> The stronger the President’s fingerprints on the executive action, the more courts should defer.

Kagan’s perception of presidential administration is uniformly positive. The President, she explains, is politically accountable to the populace and can use his influence to coordinate and achieve ambitious regulatory goals within an otherwise ossified bureaucracy. If the executive ever goes too far, Kagan maintains, the courts stand ready to check arbitrary and capricious activity. These parameters—apart from technocratic expertise—she argues, should give the courts comfort in deferring to the White House’s regulatory agenda.<sup>5</sup>

There is a flipside to Kagan’s theory of presidential administration. Certain instances of high-level influence may be less salutary. First, where an incoming administration reverses a previous administration’s interpretation of statute, simply because a new sheriff is in town, courts should verify if the statute bears such a fluid construction. Second, where an administration discovers a heretofore unknown power in a statute that allows it to confer substantive rights, courts

1. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

2. *Id.* at 2374.

3. *Id.* at 2372.

4. *Id.* at 2373.

5. *Id.* at 2252.

should raise a red flag, especially when the authority exercised was one Congress withheld. Third, where an administration declines to enforce a statute that Congress refuses to repeal, under the guise of prosecutorial discretion, courts should view the action with skepticism. Fourth, where evidence exists that the White House attempted to exert its influence and intrude into the rule-making process of independent agencies, courts should revisit the doctrine concerning altered regulatory positions.

This Article puts Kagan's thesis to the test by analyzing these four species of executive influence, assessing when the virtues of presidential administration deserve deference, and considering when the vices of *presidential maladministration* warrant skepticism.

Part II provides an overview of *Chevron's* approach to administration and introduces Professor Kagan's remix of that doctrine. Section III.A explores *presidential reversals*. Within the context of *Chevron* deference, courts view ambiguous statutes as susceptible to evolving interpretations, which can explicitly change from presidency to presidency. *Chevron* itself arose when the Reagan Administration reversed the Carter Administration's interpretation of the Clean Air Amendments.<sup>6</sup> Outside of *Chevron*, however, courts are skeptical of changed interpretations for unambiguous statutes—especially when the change is justified based only “upon further reflection,” which is a euphemism for “upon further election.”

With respect to *presidential discovery*, Section III.B will consider two prominent examples where the executive branch has abandoned an earlier interpretation in order to identify and aggrandize new powers: The Clinton Administration's assertion of authority to regulate tobacco (which was invalidated in *FDA v. Brown & Williamson Tobacco*<sup>7</sup>) and the Obama Administration's novel interpretations of the Affordable Care Act, providing it with the power to subsidize congressional healthcare and to make payments to unprofitable insurance companies. While standing was clear-cut in the first instance, and tentative in the second, the payment of subsidies for members of Congress and their staffers was a clear violation of the ACA, but went unredressed by the courts. Accountability is frustrated when discovery of new powers inflicts no injuries and is insulated from judicial review.

Section III.C studies *presidential nonenforcement*. The Court has recognized that nonenforcement of a statute is subject to judicial review if “the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>8</sup> To analyze this approach to executive abnegation, first we will revisit the “administrative fix” to the Affordable Care Act, which suspended the enforcement of the individual mandate for millions of Americans who could not afford insurance policies on the new exchanges. Second, we will study President Obama's executive actions on immigration, known as Deferred Action for Childhood Arrivals (“DACA”) and Deferred Action for Parents of American and Lawful Permanent Residents

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6. *Id.* at 2376.

7. 529 U.S. 120, 161 (2000).

8. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).

(“DAPA”). These policies traversed a cycle I refer to as the *Five Ds*: while Congress *deliberated* immigration reform, the President *disclaimed* the power to act unilaterally. After the bills were *defeated*, the administration *debated* internally and *discovered* the powers to do that which it previously announced it could not. Evidence of presidential nonenforcement in both cases properly warrants judicial skepticism.

Finally, we conclude our analysis in Section III.D with a study of *presidential intrusion*. With this species of maladministration, the White House uses its unique position to influence the decision-making process of independent agencies. To illustrate this phenomenon, we will focus on the Obama Administration’s coordinated efforts to impact the Federal Communication Commission’s rule-making process on net neutrality. Even if the agency was not pressured, the appearance of impropriety is sufficient to warrant a hesitance before blindly deferring to an agency’s changed positions.

Professor Kagan’s overly sanguine view of presidential administration—bolstered by unrealistic expectations of accountability and nonexistent paths of judicial review—is worthy of reconsideration. A careful accounting of presidential reversal, discovery, nonenforcement, and intrusion weakens the general foundation of judicial deference to administrative agencies. Courts should hesitate before rewarding maladministration with obeisance. Indeed, deference encourages further abuses of the administrative process. This nudging—in the most extreme cases—should be discouraged with heightened scrutiny. As the Federal Register has recently turned the page from Obama to Trump, this Article provides a timely analysis of how courts react to unpresided<sup>9</sup> approaches to maladministration.<sup>10</sup>

## II. PRESIDENTIAL ADMINISTRATION

### A. Chevron Classic

Under the familiar rule established in *Chevron v. Natural Resource Defense Council*, courts will defer to an agency’s reasonable interpretation of an ambiguous statute.<sup>11</sup> Traditionally, the *Chevron* framework has been premised on two primary principles. First, by drafting an ambiguous statute, Congress

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9. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 17, 2016, 4:30 AM), <https://twitter.com/realdonaldtrump/status/810099766063493120> [<http://archive.is/asd9Z>].

10. During the constitutional convention, George Mason of Virginia proposed adding “maladministration” to the grounds of impeachment for the President. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 550 (Max Farrand ed., 1911). This term of art was used in the Virginia Constitution to impeach the Governor. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3813 (Francis Newton Thorpe ed., 1909). James Madison objected to this phrase, because “so vague a term will be equivalent to a tenure during pleasure of the Senate.” Farrand, *supra*, at 550. Mason then replaced “maladministration” with “high crimes and misdemeanors,” the phrasing that was ultimately ratified. *Id.* While maladministration is not an enumerated ground for impeachment, it ought to serve as grounds for judicial scrutiny.

11. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

sought to delegate authority over technical decisions to agencies with “great expertise.”<sup>12</sup> Second, with respect to the separation of powers, “Congress has delegated policy-making responsibilities” to the agencies, not to the courts.<sup>13</sup> Agencies “charged with responsibility for administering the provision would be in a better position to” make these decisions than judges who are “not part of either political branch of the Government.”<sup>14</sup>

In *Presidential Administration*, then-Professor Elena Kagan highlights an underappreciated element of the latter justification. “[A]n agency to which Congress has delegated policymaking responsibilities,” Justice Stevens posited in *Chevron*, “may, within the limits of that delegation, properly rely upon the *incumbent administration’s* views of wise policy to inform its judgments.”<sup>15</sup> The Court noted, “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices.”<sup>16</sup> As a result, courts, which are not accountable and “have no constituency, have a duty to respect legitimate policy choices made by those who do.”<sup>17</sup> Kagan explains that “[a]s first conceived, the *Chevron* deference rule had its deepest roots in a conception of agencies as instruments of the President, entitled to make policy choices, within the gaps left by Congress, by virtue of his relationship to the public.”<sup>18</sup>

A “sounder version” of the *Chevron* doctrine, Kagan poses, would “take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled.”<sup>19</sup> Such “agency decisions [that] lack this kind of presidential imprimatur, proceeding as they do from considerations not fairly traceable to presidential policy,” do not warrant this special blend of deference.<sup>20</sup> “[D]eference should attach not to the whole but only to some subset of agency action,” Kagan writes, where the regulation is supported by “the political leadership and accountability that the President offers.”<sup>21</sup> Courts applying *Chevron* should not ignore this participation, but instead “recognize[], and thereby promote[], actual rather than assumed presidential control over administrative action.”<sup>22</sup> If courts “[c]ondition[] deference in this way,” it would have the effect of “induc[ing] disclosure of any presidential role in administration and encourage expansion of this role to so far neglected areas of regulation.”<sup>23</sup>

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* (emphasis added).

16. *Id.* (emphasis added).

17. *Id.* (emphasis added).

18. Kagan, *supra* note 1, at 2373.

19. *Id.* at 2372.

20. *Id.* at 2376.

21. *Id.*

22. *Id.*

23. *Id.* at 2377.

### B. *Chevron Redux*

The accountability rationale, however, never caught on with the Supreme Court. According to Professor Peter Shane, the case law has not moved since *Presidential Administration* was published. “What Kagan accurately observed as of 2001” he noted, “is yet more emphatically true in 2014.”<sup>24</sup> Nor has this theory fared well in the academy.<sup>25</sup> Shane aptly summarizes the modern-day grounding of *Chevron* deference: “courts defer to specific agencies because Congress has chosen specific agencies to be the locus of policymaking,” not because of “presidential administration.”<sup>26</sup>

Kagan concedes that, since *Chevron* was decided, the accountability “rationale has receded, and the deference rule has become disconnected from considerations relating to presidential involvement.”<sup>27</sup> The courts, with few exceptions, “have ignored the President’s role in administration action in defining the scope of the *Chevron* doctrine.”<sup>28</sup> While “this consideration took pride of place in *Chevron* itself,” Kagan acknowledges, “the figure of the President has barely appeared in recent judicial discussions of deference.”<sup>29</sup> Indeed, she writes, deference is granted “irrespective whether the President potentially could, or actually did, direct or otherwise participate in their promulgation.”<sup>30</sup> In fact, a presumption exists that evidence of presidential nudging could even thwart *Chevron* deference. Kagan recalls that during her stint in the executive branch, “the Department of Justice occasionally counseled Clinton White House staff members (though not successfully) to maintain a public distance between the President and agency action, lest his personal direction and appropriation of administrative product undermine the expertise rationale for *Chevron* deference.”<sup>31</sup>

Still, the former White House attorney sought a “new embrace of the Court’s original reasoning—committed to and thus supportive of presidential control over administrative action.”<sup>32</sup> Such an approach, she notes, “would

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24. Peter M. Shane, *Chevron Deference, The Rule of Law, and Presidential Influence in the Administrative State*, 83 *FORDHAM L. REV.* 679, 693 (2014).

25. *Id.* at 699 (“For all the reasons given above why White House involvement should not be allowed to convert an otherwise arbitrary statutory interpretation into a deference-worthy interpretation, neither rule of law values, nor democratic values more generally, would support deferring to a White House–induced legal interpretation which, even if legally justifiable, is inferior to a sounder legal interpretation preferred by the administrative institution as Congress’s preferred decision maker about the statute at issue. A legal regime that would allow a plausible White House legal interpretation to trump a superior agency interpretation would arguably incentivize substandard lawyering by both the agency and the White House. Agency lawyers would realize that having the best possible interpretive argument would not immunize them from White House pressure to change, and the White House would know that it would not need the best possible argument to take interpretive authority away from the agency.”); cf. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 7 (2009) (“The result is that insufficient attention has been given to exploring whether political factors ought to be allowed to validly explain agency rulemaking decisions as a normative matter and what concrete alterations might be made to existing arbitrary and capricious review doctrine to embrace a proper, even if limited, place for politics.”).

26. Shane, *supra* note 24, at 694.

27. Kagan, *supra* note 1, at 2373.

28. *Id.* at 2375.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 2373.

counsel a variable deference regime, dependent on the role of the President in an agency's interpretive decisionmaking."<sup>33</sup> *Presidential Administration* reenvisioned administrative law through the lens of the President's influence on the regulatory state. To Kagan, rather than focusing on "special expertise and experience" for the grounding of *Chevron* deference, "a sounder version" would "take unapologetic account of the extent of presidential involvement in administrative decisions in determining the level of deference to which they are entitled."<sup>34</sup> For executive-branch agencies, whose principal officers are subject to removal power, courts applying *Chevron* should be "attuned to the role of the President" and "giv[e] greater deference" than for independent agencies.<sup>35</sup> Doing so would encourage and "promot[e] this kind of presidential involvement."<sup>36</sup>

Kagan views "accountability and effectiveness" as the "principal values that all models of administration must further."<sup>37</sup> Effectiveness can promote "so-called technocratic values: cost-effectiveness, consistency, and rational priority-setting."<sup>38</sup> For example, the President can impose a "coherent regulatory philosophy" "throughout the administrative state," thus "synchroniz[ing]" disparate bureaucratic interests.<sup>39</sup> Further, quoting Alexander Hamilton, Kagan notes that the White House can inject "dynamism or energy" to "adopt, modify, or revoke regulations, with a fair degree of expedition, to solve perceived national problems."<sup>40</sup> This "decision" and "dispatch," "now as then . . . play[s] a critical role in a well-functioning political system."<sup>41</sup>

Though effectiveness is an important attribute, accountability does most of the heavy lifting in *Presidential Administration*. First, Kagan writes, presidential administration "enhances transparency" because it "enabl[es] the public to comprehend more accurately the sources and nature of bureaucratic power."<sup>42</sup> Second, direction from the White House "establishes an electoral link between the public and the bureaucracy, increasing the latter's responsiveness to the former."<sup>43</sup> Presidential administration, Kagan contends, "advance[s] these core

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33. *Id.*

34. *Id.* at 2372, 2374; see also David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 204 ("More briefly said, the Court should refocus its inquiry from the 'how' to the 'who' of administrative decision making. If the congressional delegatee of the relevant statutory grant of authority takes personal responsibility for the decision, then the agency should command obeisance, within the broad bounds of reasonableness, in resolving statutory ambiguity; if she does not, then the judiciary should render the ultimate interpretive decision.").

35. Kagan, *supra* note 1, at 2377.

36. *Id.* at 2364.

37. *Id.* at 2251–52.

38. *Id.* at 2339.

39. *Id.* at 2339, 2341.

40. *Id.* at 2341 (citing THE FEDERALIST NO. 70 (Alexander Hamilton)) ("Energy in the executive is a leading character in the definition of good government.").

41. *Id.* at 2343 (citing THE FEDERALIST NO. 70, at 403 (Alexander Hamilton)).

42. *Id.* at 2331–32.

43. *Id.* at 2332.



democratic values” more powerfully than any other mode.<sup>44</sup> The crux of this fidelity was that the Executive is in the best position to “track[] political accountability.”<sup>45</sup>

This link between the President and the electorate should give courts confidence that the regulation at issue is entitled to heightened deference. In certain instances of executive action discussed in Part III, which I have dubbed presidential maladministration, however, this presumption should be reversed.

### III. PRESIDENTIAL MALADMINISTRATION

#### A. *Presidential Reversals*

The first species of presidential maladministration is by far the most commonplace: when the incumbent administration abandons a previous administration’s interpretation of a statute. Every four to eight years, to comply with the new President’s regulatory philosophy, political appointees in agencies alter certain interpretations of the law—often with direction from the top. These changes are not always implemented through the formal notice-and-comment process, but rather can be manifested through informal opinion letters, guidance documents, and even legal briefs.<sup>46</sup> Regardless of their form, these presidential reversals are the ultimate, and clearest, forms of commander-in-chief nudging to the administrative state.

There is nothing nefarious when a new administration disagrees with a previous administration. Indeed, it is quite natural that presidents see things differently. The question is how courts should treat this reversal. Outside of *Chevron*’s framework, the Supreme Court has maintained that presidential reversals are “entitled to considerably less deference.”<sup>47</sup> In recent years, the Roberts Court—led by the Chief Justice himself—has faulted the Solicitor General’s abandonment of earlier positions “upon further reflection.”<sup>48</sup> Within the cozy confines of “*Chevron*’s domain,”<sup>49</sup> however, old interpretations of ambiguous statutes are not chiseled in stone, so “sharp break[s] with prior interpretations” do not weaken deference.<sup>50</sup> Both blends of reversals are policy decisions all the way down and should give courts pause to consider whether the newly minted interpretation is any more reasonable than the abandoned one.

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44. *Id.*

45. *Id.* at 2373.

46. *See, e.g.*, JARED P. COLE & TODD GARVEY, CONG. RESEARCH SERV., R44468, GENERAL POLICY STATEMENTS: LEGAL OVERVIEW 5 (2016).

47. *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

48. *See* Debra Cassens Weiss, *Chief Justice Criticizes ‘Disingenuous’ Characterization of Administration Flip-Flops*, A.B.A. J. (Nov. 29, 2012), [http://www.abajournal.com/news/article/chief\\_justice\\_criticizes\\_disingenuous\\_characterization\\_of\\_administration](http://www.abajournal.com/news/article/chief_justice_criticizes_disingenuous_characterization_of_administration).

49. *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833 (2001).

50. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 862 (1984).

1. “Entitled to considerably less deference”

*Watt v. Alaska* considered a fairly mundane issue of administrative law: “which of two federal statutes provides the formula for distribution of revenues received from oil and gas leases on national wildlife refuges reserved from public lands.”<sup>51</sup> In 1975, the Solicitor of the Interior under the Ford Administration altered the agency’s previous interpretation, determining that revenues from the leases should be distributed according to a 1964 amendment to the Wildlife Refuge Revenue Sharing Act (“WRRSA”), rather than the original Mineral Leasing Act (“MLA”) of 1920.<sup>52</sup> The Comptroller General affirmed this opinion.<sup>53</sup> The Kenai Peninsula Borough, a “county” within the relevant public lands, sought a declaration that the WRRSA governed.<sup>54</sup> The State of Alaska filed a separate suit contending that the MLA still controlled.<sup>55</sup> The D.C. Circuit Court of Appeals ruled that the 1964 WRRSA trumped the 1920 MLA.<sup>56</sup>

The Supreme Court granted certiorari on October 6, 1980, and Solicitor General Wade H. McCree filed his merit brief two weeks after the presidential election on November 19, 1980.<sup>57</sup> The Carter Administration, consistent with the views of the Ford Administration, maintained that the WRRSA governed the land in the Kenai Peninsula Borough.<sup>58</sup> The case was argued on January 13, 1981, one week before President Reagan’s inauguration.<sup>59</sup> (There is no indication that the Reagan Administration altered this position in the ensuing three months before the case was decided.)

The Supreme Court reversed the D.C. Circuit, “[f]inding no ‘clearly expressed congressional intention’ to repeal [the MLA] . . . by implication.”<sup>60</sup> Beyond its study of the statutory text and legislative history, Justice Powell’s majority opinion stressed that for the first decade after the WRRSA was amended in 1964, the Department of the Interior interpreted it “as not altering the distribution formula” from the 1920 MLA. “The Department’s contemporaneous construction,” he noted, “carries persuasive weight.”<sup>61</sup> Further, because the “Department first proposed the amendment” in 1964, “attention to contemporaneous construction is particularly appropriate.”<sup>62</sup>

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51. 451 U.S. at 260.

52. *Id.* at 261–62.

53. *Id.* at 263.

54. *Id.*

55. *Id.*

56. *Id.* at 264.

57. Brief for the Federal Petitioners at 1, *Andrus v. State of Alaska*, 449 U.S. 818 (1980) (Nos. 79-1980, 79-1904), 1980 WL 339693.

58. *Id.* at 11 (“The only question presented is whether the Wildlife Refuge Revenue Sharing Act, as amended in 1964, governs the distribution of federal revenues from oil and gas leases covering areas of the public domain withdrawn for refuge purposes. On the face of the text, as both courts below recognized, the answer is a clear affirmative. In our submission, this is an occasion for applying the ‘plain meaning’ rule of statutory construction.”).

59. *Watt*, 451 U.S. at 259.

60. *Id.* at 273.

61. *Id.* at 272–73.

62. *Id.* at 273.

In contrast, Justice Powell pointed out that “[t]he Department’s current interpretation, being in conflict with its initial position, is entitled to considerably less deference.”<sup>63</sup> This was true even though the Ford, Carter, and presumably Reagan Administrations all agreed. As time elapses, changes in the interpretation of a fixed statute are less likely to reflect the original understanding and intent of the drafters, and more likely to represent the vicissitudes of present-day politics. The former views are worthier of deference than the latter.<sup>64</sup> The novel interpretation of the WRRSA, the *Watt* Court concluded, was “wholly unpersuasive.”<sup>65</sup>

Professor Peter Shane doubts the proposition that the “interpretation of a statute can fluctuate based on the preferences of a majority of the President’s electoral supporters.”<sup>66</sup> Such an interpretation, Shane posits, “presumably cannot be squared, however, with the supporters of the Congress that enacted the statute in question.”<sup>67</sup> Along similar lines, in 1985, a young Merrick B. Garland made this point in the *Harvard Law Review*. He wrote that “abrupt and profound alterations in an agency’s course may signal a loss of fidelity to that original [congressional] intent.”<sup>68</sup> Discussing the pre-*Chevron* line of cases, the once-and-future Supreme Court nominee noted that “[u]ntil the statute itself is amended . . . the original congressional intent—and not the shifting political tide—is the source of the agency’s legitimacy.”<sup>69</sup> It is not enough for the new administration to simply strike “a new ‘balance.’”<sup>70</sup>

The Rehnquist Court applied the *Watt* framework in several cases. In *INS v. Cardoza-Fonseca*, the Court rejected the agency’s “request for heightened deference to its position” due to “the inconsistency of the positions the [Board of Immigration Appeals] has taken through the years.”<sup>71</sup> The Reagan Administration had abandoned the views of previous administrations. Justice Stevens, writing for the majority, cited *Watt* for the proposition that “[a]n agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.”<sup>72</sup>

The next year in *Bowen v. Georgetown University Hospital*, the Court rejected the Reagan Administration’s attempt to retroactively impose new cost limits on Medicare reimbursements.<sup>73</sup> Justice Kennedy, writing for a unanimous Court, found that deference was unwarranted, in part, because the “Secretary’s current interpretation of clause is contrary to the narrow view of that provision

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63. *Id.*

64. Shane, *supra* note 24, at 699 (“Ignoring the democratic process that generated a statute in favor of the merely presumed political preferences of a contemporary majority represents no overall gain in democratic legitimacy.”).

65. *Watt*, 451 U.S. at 273.

66. Shane, *supra* note 24, at 698–99.

67. *Id.* at 699.

68. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 585 (1985).

69. *Id.* at 585–86.

70. *Id.* at 585.

71. 480 U.S. 421, 446 n.30 (1987).

72. *Id.*

73. 488 U.S. 204, 215–16 (1988).

advocated in past cases.”<sup>74</sup> This reversal, the Court found, was not “a reasoned and consistent view of the scope” of the statute, but “appear[ed] to be nothing more than an agency’s convenient litigating position.”<sup>75</sup>

*Good Samaritan Hospital v. Shalala*, decided in 1993, presented another Medicare-reimbursement reversal.<sup>76</sup> Solicitor General Kenneth W. Starr’s brief, filed on December 30, 1992—three weeks before the inauguration—took the position that hospitals were not entitled to petition for additional reimbursements beyond the limits established by the Secretary of Health and Human Services.<sup>77</sup> The hospitals countered “that any deference to the agency’s current position is unwarranted in light of its shifting views on the matter.”<sup>78</sup> Justice White’s majority opinion recognized that “over the years the agency has embraced a variety of approaches,” comparing contradictory positions taken by the United States in 1988, 1985, and 1976.<sup>79</sup> The Court acknowledged that the Secretary “is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation.”<sup>80</sup> Yet, Justice White reasoned, “the consistency of an agency’s position is a factor in assessing the weight that position is due.”<sup>81</sup>

This observation was tempered because the shift “resulted from intervening and possibly erroneous judicial decisions.”<sup>82</sup> Ultimately, the Court deferred to the government’s most recent interpretation of the statute, which it found was “at least as plausible as competing ones.”<sup>83</sup> In these non-*Chevron* cases, presidential reversals were met with consistent skepticism.

## 2. “Upon further reflection”

Perhaps the most visible manifestation of a presidential reversal is the phrase “upon further reflection.” This is a euphemism the government invokes to indicate that it is abandoning an earlier position for a new one. This phrase has primarily been used by the Solicitor General to alter a position the Justice Department took earlier in the lower courts during litigation.<sup>84</sup> At times, however, the phrase “further reflection” has been employed as a euphemism for “the

74. *Id.* at 212–13.

75. *Id.*

76. 508 U.S. 402, 404 (1993).

77. Brief for the Respondent at 2, *Good Samaritan Hosp. v. Sullivan*, 506 U.S. 914 (1992) (No. 91-2079), 1992 WL 511978.

78. *Good Samaritan Hosp.*, 508 U.S. at 416.

79. *Id.* (“*Compare, e.g.,* *Regents of Univ. of Cal. v. Heckler*, 771 F.2d 1182 (9th Cir. 1985) (agency contends that clause (ii) permits only book balancing); *Whitecliff v. United States*, [536 F.2d 347 (Ct.Cl. 1976)] (same), *with* [*Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)] (agency argues that clause (ii) allows retroactive rulemaking).”).

80. *Id.* at 417.

81. *Id.* (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (quoting *Watt*, 451 U.S. at 273).

82. *Id.* at 417.

83. *Id.*

84. I located six briefs that used this phrase to indicate an alteration of a position taken in the lower courts. Brief for the United States as Amicus Curiae Supporting Petitioners at 30 n.12, *Decker v. Nw. Env'tl. Def. Ctr.*, 568 U.S. 597 (2012) (Nos. 11-338, 11-347), 2012 WL 3864278 (“*On further reflection*, however, the timing question is irrelevant to the resolution of this case.”) (emphasis added); Brief for the United States Supporting Petitioner at 13 n.5, *Bond v. United States of America*, 564 U.S. 211 (2011) (No. 09-1227), 2010 WL 4954355 (“In its supplemental brief to the court of appeals, the United States argued that petitioner lacked standing to

new administration sees things differently.” Tony Mauro, veteran Supreme Court reporter for the *National Law Journal*, pointed out that in the Solicitor General’s office, “upon further reflection” is usually understood to mean “upon further election.”<sup>85</sup>

For example, in a 1985 brief to the Court in *Evans v. Jeff D.*, President Reagan’s acting Solicitor General rejected a position taken by President Carter’s Solicitor General involving attorney’s fees in civil rights actions in *White v. New Hampshire Department of Employment Security*.<sup>86</sup> “Upon further reflection, and with the benefit of nearly four years of experience under the Equal Access to Justice Act,” the brief stated, “we have concluded that our earlier suggestion was impractical and that the ethical concerns, though not insignificant in particular cases, are neither so frequent nor so intractable as to call for the *per se* rule

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bring her enumerated-powers claim. *Upon further reflection*, the government concluded to the contrary that petitioner has standing to bring her claim.”) (emphasis added); Brief for the United States as Amicus Curiae Supporting Petitioner at 20 n.9, *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (No. 99-1529), 2000 WL 1168615 (“*On further reflection*, we have concluded that Section 11.07.010 also conflicts with additional provisions of ERISA that are applicable to both plans.”) (emphasis added); Reply Brief for the Petitioners at 11 n.8, *Burke v. Barnes*, 479 U.S. 361 (1987) (No. 85-781), 1986 WL 727966 (“In light of Judge Bork’s dissenting opinion and *upon further reflection*, petitioners no longer adhere to the view expressed in oral argument before the court of appeals that the Senate has standing in this case.”) (emphasis added); Brief for the Federal Respondents at 21 n.10, *GTE Sylvania, Inc. v. Consumers Union of the United States*, 445 U.S. 375 (1980) (No. 78-1248), 1979 WL 199351 (“Although we originally argued to the contrary, *on further reflection* we have become persuaded (as we noted in our briefs in response to petitioners’ two petitions for a writ of certiorari) that the court of appeals is correct on this point.”) (emphasis added); Brief for the United States at 14 n.9, *Combs v. United States*, 404 U.S. 1014 (1972) (No. 71-517), 1972 WL 135693 (“In our Memorandum in Opposition to the certiorari petition (pp. 4–5), we intimated that this consideration might be relevant to the standing question. But, for the reasons set forth *infra*, *further reflection* has persuaded us that it should have no bearing on the issue now before this Court.”) (emphasis added); Brief for the United States on Reargument at 39–40, *Marchetti v. United States*, 390 U.S. 39 (1968) (Nos. 2, 12), 1967 WL 113560 (“In our *Costello* brief last Term [the government argued a different rule applies to the returns]. . . . *On further reflection*, however, we have concluded that an excise tax return must be filed along with and accompany payment of the tax.”) (emphasis added).

85. Tony Mauro, *Roberts Takes SG’s Office to Task over Shifting Positions*, NAT’L L. J. (Nov. 27, 2012), <http://bit.ly/2beDvRt>.

86. On March 25, 1981, the Supreme Court invited the views of the Solicitor General in the case of *White v. New Hampshire Department of Employment Security*. Brief for the United States as Amicus Curiae at 2, *White v. N.H. Dep’t of Emp’t Sec.*, 455 U.S. 445 (1982) (No. 80-5887). By that point, the Reagan Administration was still coalescing, and the eventual Solicitor General—Rex E. Lee—would not be nominated until June 1981. Theodore B. Olson, *Rex E. Lee Conference on the Office of the Solicitor General of the United States*, 2003 BYU L. REV. 1, 48 (2003). President Carter’s Solicitor General, Wade H. McCree, Jr., was holding over into the new administration. *Id.* at 63. In recent years, it has been the tradition that Solicitors General step down in the June before the election, but this practice is of recent vintage. *Id.* at 177. For example, Solicitor General Erwin N. Griswold was appointed by President Johnson, but he stayed on for the first four years of the Nixon administration. Solicitor General Bork, appointed by President Nixon, stayed in office until the day President Carter was inaugurated. *Id.* In 1981, Attorney General William French Smith decided that Solicitor General McCree would “finish out the term of Court.” *Id.* at 63 (transcribing remarks from former Solicitor General Ken Starr). On April 29, 1981, Solicitor General McCree replied that, for purposes of the Civil Rights Attorney’s Fee Awards Act of 1976, attorneys are not required to discuss their fees during a settlement process. Brief for the United States as Amicus Curiae at 10, *White v. N.H. Dep’t of Emp’t Sec.*, 455 U.S. 445 (1982) (No. 80-5887), <http://bit.ly/2bjePfx>. “Detailed fee discussions,” the brief noted, “should ordinarily be conducted after agreement on the merits has been reached.” *Id.* at 11–12. Discussing the fees earlier “raises troublesome ethical problems,” because “the attorney may have an interest adverse to his client if the question of the size of his fees becomes part of the settlement negotiations.” *Id.* at 10. The Court ultimately disagreed with Solicitor General McCree’s brief, stating in a footnote, “Although such situations may raise difficult ethical issues for a plaintiff’s attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.” *White v. N.H. Dep’t of Emp’t Sec.*, 455 U.S. 445, 453 n.15 (1982).

adopted by the court of appeals.”<sup>87</sup> The reference to “nearly four years” is a clear repudiation of the statement made by President Carter’s holdover Solicitor General, over three months after President Reagan’s inauguration. This is a quintessential example of a presidential reversal following “further reflection.” Ultimately, the Court did not reach this issue in *Evans*.<sup>88</sup>

I was not able to locate any usages of the phrase “further reflection” from the Solicitors General in the Bush, Clinton, or Bush Administrations. For three cases argued during the October 2012 Term, however, the Obama Administration engaged in some deep reflection. In *Kiobel v. Royal Dutch Petroleum*, a group of Nigerian nationals living in the United States brought suit “alleging that the corporation [defendant] aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria.”<sup>89</sup> The Court granted certiorari to determine whether it could “recognize a cause of action under the Alien Tort Statute (ATS), for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>90</sup> The ATS, enacted as part of the canonical Judiciary Act of 1789, provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>91</sup>

In 1795, Attorney General William Bradford issued an opinion interpreting the ATS.<sup>92</sup> In the 2008 case of *American Isuzu Motors, Inc. v. Ntsebeza*, the Bush Administration’s State Department read Bradford’s opinion to confirm that ATS claims could not be brought for conduct “in a foreign country.”<sup>93</sup> Citing the Bradford opinion, then-Solicitor General Paul Clement told the Court that “[t]he presumption against extraterritorial legislation was well-established at the time the ATS was adopted.”<sup>94</sup>

After the change in administration, however, that position flipped. In his *Kiobel* brief, Solicitor General Donald Verrilli explained that “on further reflection, and after examining the primary documents,” the State Department “acknowledges that [Bradford’s] opinion is amenable to different interpretations.”<sup>95</sup> Now, the government concluded that the ATS “could have been meant to encompass . . . conduct” outside the United States.<sup>96</sup>

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87. Brief for the United States as Amicus Curiae Supporting Reversal at n.5, *Evans v. Jeff D.*, 475 U.S. 717 (1986) (No. 84-1288), <https://www.justice.gov/sites/default/files/osg/briefs/1985/01/01/sg850174.txt>.

88. *Evans*, 475 U.S. at 723.

89. 569 U.S. 108, 112 (2013).

90. *Id.* at 108.

91. 28 U.S.C. § 1350 (2012).

92. *See* *Breach of Neutrality*, 1 Op. Att’y Gen. 57 (1795).

93. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 8 n.1, *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2012) (No.10-1491), 2012 WL 2161290 (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 15–16, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07- 919), 2008 WL 408389) (quoting 1 Op. Att’y Gen. at 58–59).

94. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 93, at 12 (quoting 1 Op. Att’y Gen. at 58–59).

95. Supplemental Brief for the United States, *supra* note 93, at 8 n.1.

96. *Id.* at 8.

During oral arguments, when Solicitor General Verrilli articulated that extraterritorial “ATS causes of action should be recognized,” Justice Scalia interjected.<sup>97</sup> “That is a new position for the . . . State Department, isn’t it?”<sup>98</sup> Verrilli replied, “[i]t’s a new—.”<sup>99</sup> Justice Scalia interrupted him midsentence. “Why should we listen to you rather than the solicitors general who took the opposite position . . . not only in several courts of appeals, but even up here.”<sup>100</sup> The United States has “multiple interests,” Verrilli answered, including “ensuring that our Nation’s foreign relations commitments to the rule of law and human rights are not eroded.”<sup>101</sup> He continued, “[i]t’s my responsibility to balance those sometimes competing interests and make a judgment about what the position of the United States should be, consistent with existing law. . . . And we have done so.”<sup>102</sup>

Justice Scalia once again interrupted the Solicitor General. “It was the responsibility of your predecessors as well, and they took a different position. So . . . why should we defer to the views of the current administration?”<sup>103</sup> With a dash of humor, Verrilli answered, “because we think they are persuasive, Your Honor.”<sup>104</sup> Over laughter, Scalia answered, “Oh, okay.”<sup>105</sup> Chief Justice Roberts was not persuaded. Reaffirming Scalia’s position, Roberts warned, “whatever deference you are entitled to is compromised by the fact that your predecessors took a different position.”<sup>106</sup> Ultimately, agreeing with the government’s new position, the Court determined that “Attorney General Bradford’s opinion defies a definitive reading and we need not adopt one here.”<sup>107</sup> No deference was granted to the reversal, however.

In *Levin v. United States*, the second case in this reflection trilogy, the petitioner suffered an injury at a Naval Hospital and sued the United States for a battery.<sup>108</sup> The Federal Torts Claim Act (“FTCA”) generally waives the government’s sovereign immunity for claims of negligence, but exempts intentional torts.<sup>109</sup> Levin claimed that the Medical Malpractice Immunity Act, commonly known as the Gonzalez Act, permitted him to sue the United States for a battery.<sup>110</sup> In the 1990 case of *United States v. Smith*, the Bush Administration rejected this construction of the Gonzalez Act.<sup>111</sup> Solicitor General Kenneth W. Starr’s brief contended that the FTCA was the exclusive remedy for such claims, and suits in federal court were not available.<sup>112</sup> The Supreme Court in *Levin*

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97. Transcript of Oral Argument at 43, *Kiobel*, 569 U.S. 108 (No. 10–1491).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 43–44.

102. *Id.* at 44.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 44–45.

107. *Id.* at 123.

108. *Levin v. United States*, 568 U.S. 503, 505–06 (2013).

109. *Id.*

110. *Id.* at 506–07.

111. *Id.* at 515–17.

112. Brief for the Petitioners at 32–33, *United States v. Smith*, 499 U.S. 160 (1990) (No. 89–1646).

noted that its prior “decision in *Smith* was thus informed by the Government’s position.”<sup>113</sup>

After several changes in administration, however, that position flipped. In 2012, the government “disavow[ed] the reading of [the statute] it advanced in *Smith*.”<sup>114</sup> In a footnote, Solicitor General Verrilli expressly stated, “[t]he government does not adhere to the statements in that brief,” which was filed in 1990.<sup>115</sup> *Amicus curiae*—appointed by the Court because the United States agreed with the lower court’s judgment—flagged this sudden reversal: “When every reader comes away with the same understanding of a provision,” *amicus* wrote, “it is powerful evidence that the shared understanding is the provision’s natural meaning.”<sup>116</sup> The friend-of-the-court added, “[t]he government offers very little in response” to explain the change after “remain[ing] consistent for many years.”<sup>117</sup>

During oral arguments, Justice Kennedy asked the Government about changing its position concerning a “central theory for your interpretation of the Act.”<sup>118</sup> He joked, “I know you would have been disappointed if we didn’t ask you about this.”<sup>119</sup> Deputy Solicitor General Pratik A. Shah replied, “[y]es, you are correct . . . . This is a change of position. We revisited it.”<sup>120</sup> Unlike in *Kiobel*, the *Levin* Court “agree[d] with the Government’s earlier view” of the FTCA “and not with the freshly minted revision.”<sup>121</sup>

The final case in this triad was *US Airways, Inc. v. McCutchen*. The appeal considered whether an employee who recovered damages from a tortfeasor was required to reimburse his health benefits plan for the entire amount it had previously paid out, including attorney’s fees.<sup>122</sup> The employee argued that the so-called “common-fund doctrine” would override the express terms of the policy and allow him to withhold his attorney’s fees from the reimbursable amount. In 2003, the Solicitor of Labor filed an *amicus* brief with the Supreme Court expressly rejecting this equitable defense, urging the Court to enforce the terms of the plan.<sup>123</sup>

After the change in administrations, that position flipped. In the government’s 2012 brief in *McCutchen*, the Solicitor General explained that “upon fur-

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113. *Levin*, 568 U.S. at 517.

114. *Id.*

115. Brief for the Respondent at 24 n.8, *Levin*, 568 U.S. 503 (No. 11-1351).

116. Reply Brief of Court-Appointed Amicus Curiae James A. Feldman in Support of Petitioner at 4, *Levin*, 568 U.S. 503 (No. 11-1351), 2013 WL 65440.

117. *Id.* at 5.

118. Transcript of Oral Argument at 47, *Levin*, 568 U.S. 503 (No. 11-1351).

119. *Id.* at 46.

120. *Id.*

121. *Levin*, 568 U.S. at 518.

122. *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 91–93 (2013).

123. Brief of Amicus Curiae Elaine L. Chao, Sec’y of the United States Dep’t of Labor, Supporting Appellee Requesting Affirmance at 17–18, *Bombardier Aerospace Employee Welfare Plan v. Ferrer et al.*, 354 F.3d 348 (2003) (No. 03–10195) (“Whatever the applicability of this doctrine as a default rule of federal common law where a plan does not expressly address the issue, ERISA plan terms that expressly provide that participants are solely responsible for the attorney fees and costs they incur in pursuit of a third-party recovery override the common fund doctrine.”).



ther reflection, and in light of this Court’s discussion” in a 2011 Employee Retirement Income Security Act (“ERISA”) decision, “the Secretary [of Labor] is now of the view that the common-fund doctrine is generally applicable in reimbursement suits” under ERISA.<sup>124</sup> This is the exact opposite argument the Labor Department advanced nine years earlier.

During oral arguments, Chief Justice Roberts criticized Deputy Solicitor General Joseph R. Palmore about this reversal. “The position that the United States is advancing today,” Roberts said, “is different from the position that the United States previously advanced.”<sup>125</sup> The Chief, with a tinge of annoyance in his voice, said that “further reflection” was “not the reason” why the position changed.<sup>126</sup> He added for emphasis, “it wasn’t further reflection.”<sup>127</sup> Roberts, who had served in the Reagan and Bush Administrations decades ago, rhetorically asked whether the real reason was that “we have a new secretary now under a new administration, right?”<sup>128</sup> Palmore attempted to answer, “[w]e do have a new secretary under a new administration,” but Roberts interrupted him.<sup>129</sup> “I think it would be more candid for your office to tell us when there is a change in position, that it’s not based on further reflection of the Secretary. It’s not that the Secretary is now of the view—there has been a change.”<sup>130</sup>

*Kiobel*, *Levin*, and *McCutchen*, each raising the same issue, were argued during a span of four months. Sensing a disquieting trend, Chief Justice Roberts sent a message of sorts to the Obama Administration: “We are seeing a lot of that lately. It’s perfectly fine if you want to change your position, but don’t tell us it’s because the Secretary has reviewed the matter further, the Secretary is now of the view. Tell us it’s because there is a new secretary.”<sup>131</sup> Palmore responded that since the earlier brief was filed, the “law has changed.”<sup>132</sup> The Chief Justice replied, “[t]hen tell us the law has changed. Don’t say the Secretary is now of the view. It’s not the same person. You cite the prior Secretary by name, and then you say, the [new] Secretary is now of the view. I found that a little disingenuous.”<sup>133</sup> The Chief had openly rebuked the Solicitor General’s office for using this malapropism to justify maladministration. Supreme Court advocate Roy Englert Jr., who worked in the Solicitor General’s office, observed that Chief Justice Roberts was “making a broader point” with his criticism, referring to the recent string of cases where the Obama Administration had reversed prior positions.<sup>134</sup>

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124. Brief for the United States as Amicus Curiae Supporting Neither Party at 22 n.9, *U.S. Airways*, 569 U.S. 88 (No. 11–1285).

125. Transcript of Oral Argument at 32, *U.S. Airways*, 569 U.S. 88 (No. 11–1285).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 33.

133. *Id.*

134. Mauro, *supra* note 85.

A related phenomenon occurs when an incoming administration withdraws a brief that was filed by the previous administration. For example, the Bush Administration filed a petition for a writ of certiorari in *Environmental Protection Agency v. New Jersey* on August 8, 2008.<sup>135</sup> On February 6, 2009, two days before the petition would have been distributed for the conference, Acting Solicitor General Edwin Kneedler moved to dismiss the petition. “Since the petition for a writ of certiorari was filed,” he wrote, “EPA has decided, consistent with the court of appeals’ ruling, to develop appropriate standards to regulate power-plant emissions under Section 7412.”<sup>136</sup> Kneedler added, “[i]n light of EPA’s decision, the government no longer seeks review of the court of appeals’ holding.”<sup>137</sup> The only circumstance that changed was the new administration’s perspective on the merits of the environmental case. The Supreme Court obliged, and dismissed the petition.<sup>138</sup>

### 3. “Such oscillation is a normal phenomenon of American politics”

Judge Richard A. Posner, in his inimitable style, aptly explained the dynamics at play when positions switch from administration-to-administration. *Sandifer v. U.S. Steel Corporation* considered whether an employer had to compensate workers “for the time they spend in putting on and taking off their work clothes in a locker room at the plant.”<sup>139</sup> Judge Posner queried “what weight” should be given to the Labor Department’s views.<sup>140</sup> He recounted that the Clinton Administration “took a narrow view of the meaning of the term ‘clothes,’” while in the “Bush Administration the Department took a broad view.”<sup>141</sup> Following the “change in administrations in 2009,” Posner noted, the Obama Administration’s Labor “Department reverted to the Clinton Administration’s position.”<sup>142</sup> The court was not disturbed in the least by these variations. “Such

135. Petition for Writ of Certiorari, *Envtl. Prot. Agency v. State of New Jersey, et al.* (No. 08-512).

136. Motion of the Env'tl. Prot. Agency to Dismiss the Case at 1–2, *Envtl. Prot. Agency*, (No. 08-512).

137. *Id.* at 2.

138. Petition Dismissed, *Envtl. Prot. Agency*, (No. 08-512), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/08-512.htm>.

139. *Sandifer v. U.S. Steel Corp.*, 678 F.3d 590, 591 (7th Cir. 2012), *aff'd*, 571 U.S. 871 (2014). This opinion was also noteworthy because Judge Posner included a photograph of his law clerk wearing the steel worker’s “clothes.” *Id.* at 592 (“The alleged clothes consist of flame-retardant pants and jacket, work gloves, metatarsal boots (work boots containing steel or other strong material to protect the toes and instep), a hard hat, safety glasses, ear plugs, and a ‘snood’ (a hood that covers the top of the head, the chin, and the neck). These work clothes are in the record, and since a picture is worth a thousand words, here is a photograph of a man modeling the clothes.”). Josh Blackman, *Judicial Fact Finding Run Amok: Judge Posner’s Judicial Fashion Shows*, JOSH BLACKMAN’S BLOG (Mar. 21, 2014), <http://joshblackman.com/blog/2014/03/21/judicial-fact-finding-run-amok-judge-posners-judicial-fashion-shows/>. In a subsequent Article III fashion show, where he timed his law clerks donning and doffing protective gear, Posner noted with approval that Justice Scalia—his often adversary—affirmed his *Sandifer* decision without any “note of disapproval, even though the photograph was not in evidence.” *Mitchell v. JCG Indus., Inc.*, 745 F.3d 837, 842 (7th Cir. 2014).

140. *Sandifer*, 678 F.3d at 598.

141. *Id.*

142. *Id.* at 599.

oscillation is a normal phenomenon of American politics,” Judge Posner wrote.<sup>143</sup> “Democrats are friendlier to unions than Republicans are.”<sup>144</sup>

The Labor Department argued in court that its “current position should carry weight” because the “position the Department took in the Bush years is wrong.”<sup>145</sup> (This was effectively the response that Solicitor General Verrilli gave to Justice Scalia when he said the Obama Administration’s views on the Alien Tort Statute were simply more “persuasive” than the Bush Administration’s.) The agency could not, Posner noted, make a “crass admission” that “its motive in switching sides was politics.”<sup>146</sup> The Seventh Circuit’s iconoclast concluded that “all that the Department has contributed to our deliberations . . . is letting us know that it disagrees with the position taken by the Bush Department of Labor.”<sup>147</sup>

How should the court confront this “considerable paradox”? With skepticism. It would “make a travesty” of deference, Posner explained, if the court’s interpretations of a fixed statute fluctuated based on what Judge J. Harvie Wilkinson III referred to as “gyrating agency letters.”<sup>148</sup> Citing *Cardoza-Fonseca*—progeny of Justice Powell’s opinion in *Watt*—the Seventh Circuit observed that the “principle of deference to interpretations of statutes by the agencies responsible for enforcing them” is “based on a belief either that agencies have useful knowledge that can aid a court or that they are delegates of Congress charged with interpreting and applying their organic statutes consistently with legislative purpose.”<sup>149</sup> The government in *Sandifer* offered no evidence that the change was attributed to “institutional knowledge of labor markets possessed by the Department’s staff.”<sup>150</sup> It was politics all the way down.<sup>151</sup> In the end, the Seventh Circuit gave no deference to the government’s position and ruled against the workers and the Obama Administration.<sup>152</sup> The Supreme Court affirmed Judge Posner’s opinion and did not even address whether the government’s position was entitled to any deference.<sup>153</sup>

Whether we accept Powell’s pragmatic approach, or Posner’s political perspective, the end result is the same: Outside of *Chevron*’s domain, when an interpretive position changes after an election—the veritable embodiment of presidential administration—courts should be more skeptical and grant greater deference to the earlier, consistent position, adopted contemporaneously with the introduction of the statute. This approach is faithful to the technocratic vision

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143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* (quoting *Sepulveda v. Allen Family Foods, Inc.*, 591 F.3d 209, 216 n.3 (4th Cir. 2009)).

149. *Id.* (citing *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)).

150. *Id.*

151. In contrast, then-Solicitor General Kagan described her jurisprudence—with a paraphrase from Stephen Hawking—as “law all the way down.” Josh Blackman, *Kagan- Law All The Way Down, Stephen Hawking-Turtles All The Way Down*, JOSH BLACKMAN’S BLOG (Jun. 30, 2010), <http://joshblackman.com/blog/2010/06/30/kagan-law-all-the-way-down-stephen-hawking-turtles-all-the-way-down/>.

152. *Sandifer*, 678 F.3d at 599.

153. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 881 (2014).

of agencies and, more importantly, it eliminates the perverse incentive of rewarding Presidents who read statutes in ways unthinkable to their drafters.

#### 4. “Consistency with earlier and later pronouncements”

The Court has extended similar skepticism in deference frameworks lesser than *Chevron*. In *Young v. United Parcel Service, Inc.*, for example, Justice Breyer’s majority opinion withheld *Skidmore* deference where the Equal Employment Opportunity Commission (“EEOC”) adopted a new position only “after th[e] Court granted certiorari.”<sup>154</sup> *Skidmore* stated that the “weight” of an agency’s informal judgment “will depend upon . . . its consistency with earlier and later pronouncements.”<sup>155</sup> In *Young*, the Johnny-come-lately EEOC’s position was “inconsistent with positions for which the Government has long advocated.”<sup>156</sup> The Solicitor General conceded that the Justice Department “has previously taken the [opposite] position,” but did not “explain the basis of its latest guidance,” nor did he explain “why has it now taken a position contrary to the litigation position the Government previously took.”<sup>157</sup> Accordingly, *Skidmore* deference was not warranted.

Likewise, in *Christopher v. SmithKline Beecham Corp.*, Justice Alito, writing for the Court, explained that *Auer* deference is “unwarranted when there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgment on the matter in question.’”<sup>158</sup> One such scenario is “when the agency’s interpretation conflicts with a prior interpretation.”<sup>159</sup> *Auer* deference was not applied in *Christopher*.

While the Court has rejected reversals when reviewing actions *de novo*, or under a lesser form of deference, with respect to *Chevron* deference, the Court has welcomingly embraced this form of maladministration.

#### 5. “Not instantly carved in stone”

The rule of *Chevron* is far more familiar than its facts. The Clean Air Amendments of 1977 established stringent permitting restrictions for air pollution generated from so-called “stationary sources,” such as power plants, as distinguished from “mobile sources” like cars.<sup>160</sup> Throughout 1979 and 1980, the Carter Administration considered whether the statute should be interpreted such

154. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1352 (2015).

155. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

156. *Young*, 135 S. Ct. at 1352.

157. *Id.* (citation omitted).

158. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (quoting *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

159. *Id.* (citing *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994)); see also *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (rejecting the agency’s “request for heightened deference to its position is the inconsistency of the positions [it] has taken through the years,” noting that “agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is entitled to considerably less deference than a consistently held agency view”) (internal quotation marks omitted) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

160. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984).

that “an existing plant that contains several pollution-emitting devices” would be treated as a single entity within a “bubble” for purposes of calculating “the total emissions from the plant,” or several different entities.<sup>161</sup> In August 1980, the EPA rejected the “bubble” rule, concluding that a rule focusing on separate polluting components was “more consistent with congressional intent,” as well as two recent decisions of the D.C. Circuit Court of Appeals.<sup>162</sup> But then came the election of 1980.

In today’s era of pen-and-phone governance, it is hard to fathom that four decades ago, the President had a hands-off approach to the administrative state. In 1979, the American Bar Association concluded that presidents “historically ‘ha[d] shunned direct intervention’ in rulemaking and that they ‘ha[d] been loath to let it appear that they were influencing regulatory agencies, even those within the executive branch, to write their regulations one way rather than another.’”<sup>163</sup> This practice changed after the election of 1980.

President Reagan, according to Professor Kagan, “self-consciously and openly adopted strategies to exert [his own] influence” on the rule-making process.<sup>164</sup> Early on in his administration, he issued Executive Order 12,291, which directed the Office of Management and Budget (“OMB”) to review all regulations before they were finalized.<sup>165</sup> The ostensible purpose of the review was to measure the costs and benefits of all regulatory actions.<sup>166</sup> But the effect of the process, Kagan suggests, was to give the White House “a form of substantive control over rule-making,” by “block[ing] some proposed rules deemed not fully consistent with Reagan’s regulatory policies.”<sup>167</sup> This “coordinating function” was performed by “the President, acting through his advisors,” often in conflict with the priorities of agencies, to which Congress “delegate[d] . . . broad authority . . . in the first place.”<sup>168</sup> Kagan observes that the “muscular nature” of this form of administration “portend[ed] excessive departures from status quo ordering.”<sup>169</sup> And that is precisely what happened to the government’s interpretation of the Clean Air Amendments.

“In 1981,” Justice Stevens observed for the *Chevron Court*, “a new administration took office and initiated a Government-wide reexamination of regulatory burdens and complexities.”<sup>170</sup> Under this mandate, the EPA “reevaluated” the source rule and determined that the “plant-wide definition was more appropriate” based on the agency’s “judgment as how to best carry out the Act.”<sup>171</sup> In

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161. *Id.* at 837.

162. *Id.* at 857 (quoting 45 Fed. Reg. 52697 (1980)).

163. Kagan, *supra* note 1, at 2277 (quoting COMM’N ON LAW & THE ECON., AM. BAR ASS’N, FEDERAL REGULATION: ROADS TO REFORM 70, 73 (1979)).

164. Kagan, *supra* note 1, at 2277.

165. *Id.* at 2277–78.

166. *Id.*

167. *Id.* at 2278–79.

168. *Id.* at 2279.

169. *Id.* at 2342.

170. *Chevron*, 467 U.S. at 857.

171. *Id.* at 858.

October 1981, the Reagan Administration formally adopted the “bubble” rule, rejecting the Carter Administration’s year-old interpretation.<sup>172</sup>

As every administrative-law student knows, the Court upheld the EPA’s new interpretation of the Clean Air Amendments, finding that it was a “reasonable” interpretation of an “ambiguous” statute.<sup>173</sup> The Reagan Justice Department argued *Chevron*<sup>174</sup> primarily as a separation-of-powers case, urging the Court to lay down a rule that would prevent judges (primarily democratic appointees on the D.C. Circuit) from interfering with the administration’s deregulatory policies.<sup>175</sup> This litigation strategy was structured to prevent courts from frustrating the executive branch’s agenda.

A less remembered part of *Chevron*, however, came on its penultimate page. The challengers argued that “[t]he fact that the agency has from time to time changed its interpretation of the term ‘source,’” should foreclose deference to the Reagan Administration’s new position.<sup>176</sup> The Court soundly rejected this argument. The fact that the EPA reversed its interpretation of “source” convinced the Court that the agency has “consistently interpreted [the term] flexibly—not in a sterile textual vacuum, but in the context of implementing policy decisions in a technical and complex arena.”<sup>177</sup> Rather than raising red flags, the Court viewed favorably the agency altering its interpretation “from time to time,” and encouraged the reconsideration of “the wisdom of its policy on a continuing basis.”<sup>178</sup> Justice Stevens noted that “[a]n initial agency interpretation is not instantly carved in stone,” especially when “Congress has never indicated any disapproval of a flexible reading of the statute.”<sup>179</sup> The Court rejected the supposition that the agency’s “interpretation is not entitled to deference because it represents a sharp break with prior interpretations of the Act.”<sup>180</sup>

#### 6. “Election of a new President”

In two significant opinions authored eight years apart, Justice Rehnquist and then-Chief Justice Rehnquist provided the most thorough grounding of deference for presidential reversals. The first opinion was a partial dissent in the administrative-law classic, *State Farm*.<sup>181</sup> The chronology of this case is similar to that of *Chevron*, which would be decided the following year. The National Traffic and Motor Vehicle Safety Act of 1966 directed the Secretary of the Treasury to promulgate certain standards for “reduc[ing] traffic accidents and

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172. *Id.* at 858–59.

173. *Id.* at 862, 865.

174. Brief of the United States, *Chevron*, 467 U.S. 837 (No. 82-1005).

175. See statement of Professor John McGinnis, who was an intern in the Solicitor General’s office when *Chevron* was briefed. *The New Chevron Skeptics*, FEDERALIST SOC’Y (Jan. 15, 2016), <http://www.fed-soc.org/multimedia/detail/the-new-chevron-skeptics-event-audiovideo>.

176. *Chevron*, 467 U.S. at 863.

177. *Id.*

178. *Id.* at 863–64.

179. *Id.*

180. *Id.* at 862.

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

deaths and injuries to persons resulting from traffic accidents.”<sup>182</sup> Starting in 1967, the Department “began consideration of ‘passive occupant restraint systems,’” such as “automatic seatbelts and airbags.”<sup>183</sup>

After several years of debate, in 1975, the deadline for car manufacturers to install “mandatory passive restraint systems” was set for August 31, 1976.<sup>184</sup> After a rule-making, the Ford Administration “suspended the passive restraint requirement.”<sup>185</sup> Following the election, and “within months of assuming office,” however, President Carter’s new appointment for Transportation Secretary reversed that decision and “issued a new mandatory passive restraint regulation” that would go into effect for large cars in 1982.<sup>186</sup> The tables turned once again after the next election. In February 1981, President Reagan’s new appointment for Transportation Secretary “reopened the rulemaking due to changed economic circumstances.”<sup>187</sup> Nine months later, the Secretary “rescinded the passive restraint requirement,” concluding that “it was no longer able to find, as [his predecessor] had in 1977, that the automatic restraint requirement would produce significant safety benefits.”<sup>188</sup> This rescission was challenged and appealed to the Supreme Court.

Justice White, writing for the *State Farm* majority, observed that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”<sup>189</sup> Recognizing that agencies are not required to “establish rules of conduct to last forever,”<sup>190</sup> and they must have “ample latitude to ‘adapt their rules and policies to the demands of changing circumstances,’”<sup>191</sup> the Court viewed its role to scrutinize “changes in current policy that are not justified by the rulemaking record.”<sup>192</sup> Accordingly, Justice White set aside this presidential reversal as “arbitrary and capricious.”<sup>193</sup>

Justice Rehnquist wrote a brief, one-page opinion concurring with the analysis concerning the rescission of the airbags mandate, but dissenting about the invalidation of the automatic seatbelt regulation.<sup>194</sup> The final paragraph is worth quoting in its entirety:

The agency’s changed view of the standard seems to be related to the election of a new President of a different political party. It is readily apparent that the responsible members of one administration may consider public

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182. National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718.

183. *State Farm*, 463 U.S. at 34–35.

184. *Id.* at 36–37.

185. *Id.* at 36.

186. *Id.* at 37.

187. *Id.* at 38.

188. *Id.* at 38 (citing Notice 25, 46 Fed. Reg. 53,419 (Oct. 29, 1981)).

189. *Id.* at 42.

190. *Id.* (quoting *American Trucking Ass’n., v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967)).

191. *Id.* (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)).

192. *Id.*

193. *Id.* at 46.

194. *Id.* at 57–59 (Rehnquist, J., concurring in part and dissenting in part).

resistance and uncertainties to be more important than do their counterparts in a previous administration. A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.<sup>195</sup>

Unlike the majority opinion, which tempers its willingness to entertain changes in opinion, Justice Rehnquist offers an unapologetic embrace of presidential reversals. Rather than exuding caution—as Justice Powell did in *Watt*—the future Chief Justice lauds the President who views things differently than his predecessors, simply because he has different views. Professor Kagan, in *Presidential Administration*, endorses the *State Farm* dissent.<sup>196</sup>

*Chevron*, which was decided one year later—and made exactly this point about presidential reversals—curiously did not even cite Rehnquist's dissent. (Rehnquist took no part in the consideration of the canonical case).<sup>197</sup> In 1991, however, then-Chief Justice Rehnquist injected his *State Farm* dissent into the *Chevron* framework. *Rust v. Sullivan* considered the Reagan/Bush Administrations' decisions to prohibit Title X funding for abortion counseling.<sup>198</sup> The challengers asserted that the new regulations “represent[ed] a sharp break from the Secretary's prior construction of the statute,” and thus were “entitled to little or no deference because they “reverse[d] a longstanding agency policy that permitted nondirective counseling and referral for abortion.”<sup>199</sup> Because previous administrations maintained a “consistent interpretation” of the statute, the challengers argued, the prior position was “entitled to substantial weight.”<sup>200</sup>

The Court disagreed. *Chevron*, the Chief Justice noted, “rejected the argument that an agency's interpretation ‘is not entitled to deference because it represents a ‘sharp break with prior interpretations’ of the statute in question.”<sup>201</sup> Even if a new administration issues a “revised interpretation,” Rehnquist explained, it “deserves deference because “[a]n initial agency interpretation is not instantly carved in stone” and “the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis.”<sup>202</sup> In *Rust*, the majority concluded, the “change of interpretation” was “amply justified” with a “reasoned analysis.”<sup>203</sup> Ultimately, the Court upheld the regulation under *Chevron*'s second step as a reasonable interpretation of the ambiguous phrase “family planning.”<sup>204</sup>

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195. *Id.* at 59.

196. Kagan, *supra* note 1, at 2380–82.

197. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1983), THE SUPREME COURT OPINION WRITING DATABASE, <http://supremecourttopinions.wustl.edu/index.php?rt=pdfarchive/details/2542> (last visited Jan. 15, 2018).

198. *Rust v. Sullivan*, 500 U.S. 173, 177–78 (1991).

199. *Id.* at 186 (citations omitted).

200. *Id.*

201. *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 857 (1984)).

202. *Rust*, 500 U.S. at 186.

203. *Id.* at 187.

204. *Id.* at 189.



Subsequent cases followed this line of reasoning. In *Smiley v. Citibank*, Justice Scalia, writing for a unanimous Court, concluded that in the context of *Chevron*, presidential reversals make sense.<sup>205</sup> So long as the regulation was not “arbitrary or capricious,” an interpretive “change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.”<sup>206</sup> That is, by writing an ambiguous statute, Congress understood that the incumbent agency would be able to interpret the term differently based on changing social circumstances. This holding is the polar opposite of Justice Powell’s *originalist* reasoning in *Watt*, which held that evolving interpretations further in time from the enactment of the statute are entitled to less deference.<sup>207</sup> Somewhat ironically, Scalia contended that an ambiguous statute is not *dead*, as he was fond of saying about the Constitution, but living.<sup>208</sup>

Justice Thomas’s majority opinion in *Brand X* reaffirmed this principle and expressly cited Justice Rehnquist’s *State Farm* dissent.<sup>209</sup> “Agency inconsistency,” he wrote, “is not a basis for declining to analyze the agency’s interpretation under the *Chevron* framework.”<sup>210</sup> These altered interpretations can be premised on “changed factual circumstances,” or even, as Rehnquist noted two decades earlier, “a change in administrations.”<sup>211</sup> Justice Thomas observed that “in *Chevron* itself, this Court deferred to an agency interpretation that was a recent *reversal* of agency policy.”<sup>212</sup> The presidential *reversal* at issue in *Brand X* was explicitly incentivized through *Chevron* deference.

In *Presidential Administration*, Kagan embraces this reasoning. She rejects judicial “suspicion of [a] change in regulatory policy,” observing that “administrative interpretations conflicting with previously held views” need not “receive diminished deference on review.”<sup>213</sup> Rather than warranting skepticism, Kagan writes, altered interpretations “following new presidential elections should provide a reason to think deference appropriate rather than the opposite.”<sup>214</sup> Kagan points out that the regulation at issue in *Chevron* showed “clear signs of presidential influence” by the Reagan Administration.<sup>215</sup> The regulation, she wrote,

205. *Smiley v. Citibank* (S.D.), N.A., 517 U.S. 735, 742 (1996).

206. *Id.*

207. *Watt v. Alaska*, 451 U.S. 259, 273 (1981).

208. Bruce Allen Murphy, *Justice Antonin Scalia and the ‘Dead’ Constitution*, N.Y. TIMES (Feb. 14, 2016), <https://www.nytimes.com/2016/02/15/opinion/justice-antonin-scalia-and-the-dead-constitution.html?mcubz=1> (“The only good Constitution is a dead Constitution. The problem with a living Constitution in a word is that somebody has to decide how it grows and when it is that new rights are—you know—come forth. And that’s an enormous responsibility in a democracy to place upon nine lawyers, or even 30 lawyers.”).

209. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). In recent years, Justice Thomas has subsequently repudiated his support of *Chevron* altogether. *Michigan v. E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (noting that *Chevron* is in “tension with Article III’s Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.”).

210. *Nat’l Cable & Telecomm.*, 545 U.S. at 981.

211. *Id.* (citing *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (Rehnquist, J., concurring in part and dissenting in part)).

212. *Id.* (emphasis added).

213. Kagan, *supra* note 1, at 2378.

214. *Id.*

215. *Id.* at 2375.

“merited deference . . . *because* [it] exhibited clear signs of presidential influence.”<sup>216</sup> The fact that the President’s new administration personally and directly affected the change is an essential attribute of presidential administration. This “‘presidentialization,’ of agencies’ interpretations of statutes,” she concludes, ought to be rewarded.<sup>217</sup>

### 7. *Reversing Reversals*

The presidential reversal is not only the most common exercise of maladministration, but is also the most innocuous. First, it is completely transparent—and at times, nakedly so. In *Kiobel*, *US Airways*, and *Levin*, the Solicitor General flagged President Obama’s reversals through the phrase, “upon further reflection.”<sup>218</sup> Even when the government does not use that phrase in a brief, it is not difficult for a reviewing court—at any level—to compare how previous administrations considered the same issue. In most cases, the parties challenging the reversal will be quick to raise these departures. In *Chevron*, *State Farm*, and *Rust*, it was utterly obvious that the positions changed when a president of a different party took office.<sup>219</sup> Specific evidence that President Reagan directed his cabinet to disregard Carter-era regulations is unnecessary. This form of administration is readily apparent, and the Court recognized it. Like any late-night infomercial, the Court proved adept at applying this before-and-after framework in *Watt*, *Cardoza-Fonseca*, *Georgetown*, and *Good Samaritan*.

Second, in cases of a presidential reversal, judicial review always remains as a valid check. When a new administration alters an old interpretation, *someone* will draw the short straw. In *State Farm*, for example, insurers would lose out on the savings that resulted from the passive safety measures. In *Chevron*, environmental groups were injured by the laxer emission standards. In *Rust*, funding was cut for doctors who provided family planning services. These injuries suffice to constitute Article III standing. As a result, courts can review, and potentially reverse, reversals that are unworthy of deference—whether they are unreasonable under *Chevron*, or even arbitrary and capricious.

Presidential reversal only becomes problematic when it is combined with what I have described as presidential discovery or nonenforcement. This tandem approach transcends an agency’s novel interpretation of a statute. Rather, as we will discuss in the next Section, this form of maladministration emboldens the White House to expand its jurisdiction, confer substantive rights, or exercise abstention, in ways that are incompatible with congressional design. In some instances, where parties benefit and none are injured, judicial review to check arbitrary exercises of power is unavailable. For such cases, standing is the government’s greatest, and only defense.

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216. *Id.* (emphasis added).

217. *Id.*

218. *See supra* Subsection III.A.2.

219. *See supra* Subsection III.A.6.

### B. *Presidential Discovery*

The second species of presidential maladministration is *presidential discovery*, which occurs when the President's administration of the regulatory process affects the location of some new authority, jurisdiction, or discretion that was heretofore unknown. This influence may constitute a reversal—for example, if a previous President determined that he lacked such authority—or it may be a novel discovery altogether on a question the agency never considered. In either case, when the President's instigation leads to an agency asserting some new power, Article III spider senses should start tingling. This caution should be even more pronounced when the discovery of the new power occurs *after* Congress refused to vest a similar power through bicameralism.

The Court's leading pronouncement on presidential discovery emerged in *FDA v. Brown & Williamson Tobacco Corp.*, a case that originated during Kagan's stint in the White House.<sup>220</sup> In this 5-4 decision, the Supreme Court smoked out President Clinton's reversal-and-discovery on whether the Food and Drug Administration had jurisdiction to regulate tobacco.<sup>221</sup> This form of maladministration injured the regulated tobacco industry, and thus it permitted judicial review.

In more recent cases, however, the injuries resulting from reversal-and-discovery were far more attenuated. The implementation of Obamacare has been the veritable embodiment of presidential maladministration. Please note that my usage of *Obamacare*, rather the *Affordable Care Act* ("ACA"), is deliberate. As I defined it in my book *Unraveled*, Obamacare is not "a pejorative, but . . . a descriptor of the Affordable Care Act's divisive political valence."<sup>222</sup> From 2013 to 2016, President Obama personally directed dozens of administrative changes to Obamacare, so much so that the law bore less-and-less resemblance to the statute Congress enacted.<sup>223</sup>

In this Section, I will focus on two leading contenders of presidential *discovery*. First, at issue in *Johnson v. OPM*, the Obama Administration abandoned its own previous interpretation of the ACA to provide heavily subsidized insurance to members of Congress—in clear contravention of the text of the statute. Second, at issue in *House of Representatives v. Burwell*, the Obama Administration abandoned its own previous interpretation of the ACA to pay cost-sharing subsidies to insurers—in clear contravention of the text of the statute. In both cases, the government's only meaningful defense was that the challengers lacked standing. With this species of "harmless" maladministration, courts are constrained in checking arbitrary and capricious behavior.

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220. 529 U.S. 120, at 144 (2000).

221. *Id.*

222. JOSH BLACKMAN, UNRAVELED: OBAMACARE, RELIGIOUS LIBERTY, AND EXECUTIVE POWER xvii (2016) [hereinafter BLACKMAN, UNRAVELED].

223. For a full study of the executive action used to modify, delay, and suspend the ACA's mandates, please read Chapters 13 and 23 of BLACKMAN, UNRAVELED, *id.*

1. “Never asserted authority”

The regulation of tobacco in the United States has a “unique political history.”<sup>224</sup> In *FDA v. Brown & Williamson Tobacco Corp.*, the Court traced the regulatory chronology of snuff. “Since its inception” in 1906, the Food and Drug Administration (“FDA”) had consistently and “expressly disavowed” jurisdiction to “regulate tobacco products.”<sup>225</sup> Justice O’Connor, writing for a 5-4 majority, explained that Congress enacted six laws regulating tobacco since 1965 “against the backdrop of the FDA’s consistent and repeated statements that it lacked authority under the [Food, Drug, and Cosmetic Act (“FDCA”)] to regulate tobacco.”<sup>226</sup> For example, during several hearings in the 1960s, the Surgeon General and representatives from the FDA “testified before Congress that the agency lacked jurisdiction under the FDCA to regulate tobacco products,” unless the product was advertised with “therapeutic claims.”<sup>227</sup> In 1972, the FDA Commissioner “testified before Congress that ‘cigarettes recommended for smoking pleasure are beyond the Federal Food, Drug, and Cosmetic Act.’”<sup>228</sup> He added that the FDA’s regulation of cigarettes “would be inconsistent with the clear congressional intent.”<sup>229</sup> The agency made similar disclaimers of authority in 1977, 1980, 1983, and 1988, insisting that “it doesn’t look like it is possible to regulate [tobacco] under the” FDCA.<sup>230</sup>

The Solicitor General conceded to the Supreme Court that before 1995, the FDA had “never asserted authority to regulate tobacco products as customarily marketed . . . .”<sup>231</sup> The government also conceded that “there is no evidence in the text of the FDCA or its legislative history that Congress in 1938 even considered the applicability of the Act to tobacco products.”<sup>232</sup> The administrations of sixteen presidents—ten Republicans and six Democrats—all agreed that the FDA could not regulate tobacco. But that would soon change.

During a press conference on August 10, 1995, President Clinton engaged in the highest level of presidential administration. Indeed, it was then-Professor Kagan’s lead example of this phenomenon.<sup>233</sup> “Today I am announcing broad executive action to protect the young people of the United States from the awful

224. *F.D.A. v. Brown & Williamson Tobacco Corp.*, et al., 529 U.S. 120, 159 (2000); see 7 U.S.C. § 1311(a) (2000) (“The marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to the general welfare.”) (repealed 2004).

225. 529 U.S. at 125.

226. *Id.* at 144.

227. *Id.* at 145–46.

228. *Id.* at 151 (citing *Public Health Cigarette Amendments of 1971: Hearings before the Commerce Subcommittee on S. 1454*, 92d Cong. 239, 242 (1972) (statement of FDA Commissioner Charles Edwards)).

229. *Brown & Williamson*, 529 U.S. at 152.

230. *Id.* at 152–56.

231. *Id.* at 146 (citing Brief for Petitioners at 37, *Brown & Williamson*, 529 U.S. 120 (No. 98-1152) (“In the 73 years since the enactment of the original Food and Drug Act, and in the 41 years since the promulgation of the modern Food, Drug, and Cosmetic Act, the FDA has repeatedly informed Congress that cigarettes are beyond the scope of the statute absent health claims establishing a therapeutic intent on behalf of the manufacturer or vendor.”) (citations omitted)).

232. *Brown & Williamson*, 529 U.S. at 146–47 (citing Brief for Petitioners, at 22 n.4, *Brown & Williamson*, 529 U.S. 120 (No. 98-1152)).

233. Kagan, *supra* note 1, at 2282–83.

dangers of tobacco,” President Clinton said.<sup>234</sup> Through “executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers.”<sup>235</sup> Though it sounded like he was signing an executive order, his speech only kicked off a preordained rule-making process. But the speech had significant effects.

The “strategy of publicly appropriating administrative action,” Kagan noted, “exerted a substantive pull on administrative decisionmaking” in “three different ways.”<sup>236</sup> First, the announcement was a “directive,” indicating that the “FDA would adopt a final rule similar, if not identical, in all important respects to the agency’s proposal.”<sup>237</sup> The rule-making process—which generated a then-record of 700,000 comments<sup>238</sup>—was a *fait accompli*.

Second, the President’s personal directive “prompted the White House staff to participate actively, if privately,” in the process, and even “instigated an agency’s” actions to adhere to the President’s agenda.<sup>239</sup> Over the nine months following the tobacco press conference, Kagan recalled, the White House coordinated the activities of the FDA, OMB, and the Justice Department to propose and finalize the rule.<sup>240</sup> Kagan related that “the Department of Justice occasionally counseled Clinton White House staff members (though not successfully) to maintain a public distance between the President and agency action” during the drafting of the tobacco regulations.<sup>241</sup> The DOJ lawyers were concerned that the President’s “personal direction and appropriation of administrative product undermine the expertise rationale for *Chevron* deference.”<sup>242</sup> After all, if the experts at the FDA were merely parroting whatever the White House told them, the Court could be more skeptical of technical findings reached through “politicization” and “presidentialization.”

These admonitions, Kagan wrote, were unsuccessful. The Justice Department’s feeble attempt to erect a wall between the President and his agency heads was likely “lawyerly overcaution,” Kagan noted, but “doubtless accurately read the courts’ post-*Chevron* decisions as showing little solicitude for the ‘politicization,’ through the ‘presidentialization,’ of agencies’ interpretations of statutes.”<sup>243</sup> Unsurprisingly, after this preordained process, the FDA published a 699-page rule, concluding that it could regulate nicotine as a “drug” under the

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234. William J. Clinton, President of the U.S., News Conference (Aug. 10, 1995), <http://www.presidency.ucsb.edu/ws/?pid=51727> [hereinafter *President’s News Conference*].

235. *Id.*

236. Kagan, *supra* note 1, at 2301.

237. *Id.*

238. *Id.* at 2283, 2283 n.148 (citing Annex: Nicotine in Cigarettes and Smokeless Tobacco Is a Drug, 61 Fed. Reg. 44,619, 44,655 (Aug. 28, 1996)).

239. Kagan, *supra* note 1, at 2302.

240. *Id.* at 2283.

241. *Id.* at 2375. This anecdote is based on an interview Kagan conducted with Bruce N. Reed, former Assistant to the President for Domestic Policy and Director of the Domestic Policy Council (Dec. 11, 2000). *Id.* at 2296 n.208.

242. *Id.* at 2375.

243. *Id.* at 2375–76.

authority of the FDCA, exactly as the President explained it would nine months earlier.<sup>244</sup>

Third, Kagan wrote that the President's announcement "sent a loud and lingering message: these were *his* agencies; *he* was responsible for their actions; and *he* was due credit for their successes."<sup>245</sup> Consider President Clinton's remarks at the press conference. Stressing that these actions came from the top, he said, "today *I* am authorizing the Food and Drug Administration to initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children."<sup>246</sup> There was no mistake with his "nakedly assertive" claim who was leading this regulatory charge.<sup>247</sup> "The public might have failed to appreciate this communication's import," Kagan observed, "but no one within the [Executive Office of the President] or agencies could have done so."<sup>248</sup>

Presidential administration—or in this case, maladministration—jolts that stasis. "The comparatively unitary, responsive, and energetic institution of the Presidency," Kagan wrote, "seems more likely than these organizations to deviate from accepted interpretations of delegation provisions."<sup>249</sup> And this is where the distinct problem of presidential discovery arises: The President's predetermined insistence that the FDA could regulate tobacco—whether or not such a power was delegated—forces the otherwise hesitant agency to reverse its longstanding position and locate this new jurisdiction. By smashing the status quo, the President pushed the agency to an *ultra vires* action it would otherwise resist. Kagan, however, championed the ability of the "unitary actor" who "can act without the indecision and inefficiency that so often characterize the behavior of collective entities."<sup>250</sup>

The final rule supporting the administration's regulation over tobacco "nowhere mentioned the President," the former White House lawyer wrote.<sup>251</sup> But there was no doubt to the public how this regulation was shaped. When the rule was finalized, "Clinton stepped up again to announce the issuance of the rule, this time in a Rose Garden ceremony."<sup>252</sup> Kagan explained that "when presidential control of administrative action is most visible that it most will reflect presidential reliance on and responsiveness to broad public sentiment."<sup>253</sup> Courts applying this execucentric vision of deference, Kagan argued, should give more weight to "actual evidence of presidential involvement in a given administrative decision," rather than merely assumed, or perhaps "boilerplate" influence.<sup>254</sup> To

244. *Id.* at 2283, 2283 n.148 (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (Aug. 28, 1996)).

245. Kagan, *supra* note 1, at 2302.

246. *President's News Conference*, *supra* note 234 (emphasis added).

247. Kagan, *supra* note 1, at 2333.

248. *Id.* at 2302.

249. *Id.* at 2350.

250. *Id.* at 2339.

251. *Id.*

252. *Id.* (citing Remarks Announcing the Final Rule to Protect Youth from Tobacco, 2 PUB. PAPERS 1332 (Aug. 23, 1996)).

253. *Id.* at 2377.

254. *Id.*

that end, “courts could apply *Chevron* when, but 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.”<sup>255</sup>

A stronger blend of *Chevron* deference is warranted for the tobacco regulations because “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.”<sup>256</sup> Measuring when that level is reached is not reducible to clear standards. But we can recognize a *per se* rule: If the President personally announces an executive action from the White House—particularly the Rose Garden—we have an “objective indicia” of presidential administration.<sup>257</sup> (We will revisit what I have dubbed the *Rose Garden Rule* with respect to President Obama’s executive action on immigration).

## 2. “Change of policy”

In *Brown & Williamson*, the Supreme Court set aside the tobacco regulations.<sup>258</sup> Much of the opinion focused on the history of congressional enactments, which established a continuous legislative intent to deprive the FDA of jurisdiction over tobacco. “Taken together,” Justice O’Connor observed for a five-member majority, the “actions [taken] by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate tobacco products.”<sup>259</sup>

Both the majority opinion and the dissent by Justice Breyer—on behalf of Justices Stevens, Souter, and Ginsburg—agreed with *Chevron*’s admonition that “the FDA’s change of positions does not make a significant legal difference.”<sup>260</sup> Justice O’Connor, however, found the prior position “bolsters the conclusion that when Congress created a distinct regulatory scheme addressing the subject of tobacco and health, it understood that the FDA is without jurisdiction to regulate tobacco products and ratified that position.”<sup>261</sup> When the FDCA was viewed “as a whole,” *Chevron* deference was inappropriate because “Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products.”<sup>262</sup>

The dissent found that the “FDA’s change of policy” has no significance because it was due to “obtained evidence . . . in the early 1990’s [that] permitted the agency to demonstrate that the tobacco companies knew nicotine achieved

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255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 2283.

259. *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 155 (2000).

260. *Id.* at 186 (Breyer, J., dissenting) (citing *Chevron*, 467 U.S. at 863) (“An initial agency interpretation is not instantly carved in stone.”). *Brown & Williamson*, 529 U.S. at 156 (O’Connor, J.) (stating that “our conclusion does not rely on the fact that the FDA’s assertion of jurisdiction represents a sharp break with its prior interpretation of the FDCA”).

261. *Id.* at 157.

262. *Id.* at 126, 133.

appetite-suppressing, mood-stabilizing, and habituating effects.”<sup>263</sup> Justice Breyer asked, rhetorically, “[w]hat changed?”<sup>264</sup> After several decades, the agencies concluded that the tobacco producers had an “intent” to assert “therapeutic claims” for their products, “even at a time when the companies were publicly denying such knowledge.”<sup>265</sup> Putting aside this scientific evidence, Justice Breyer was nonplussed that “the current administration simply took a different regulatory attitude,” and “nothing in the law prevents the FDA from changing its policy for such reasons.”<sup>266</sup>

In closing, Justice Breyer block quotes then-Justice Rehnquist’s partial dissent in *State Farm*, which reaffirmed that “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations.”<sup>267</sup> Now-Chief Justice Rehnquist joined the *Brown & Williamson* majority.

Despite the majority’s citation to *Chevron*, Justice O’Connor’s majority opinion exuded a skepticism about the FDA’s sudden discovery of this new power. The history demonstrates that the FDA consistently maintained it lacked this jurisdiction, and Congress repeatedly declined to delegate such authority. This position was held consistently for over half a century. That was, until the Clinton Administration discovered in 1996 that the FDA actually had this authority all along.

The Court’s deference analysis represented a perceptible departure from *Chevron*’s endorsement of presidential reversals. This shift, I contend, is due in part to the combination of reversal and discovery. It was not troubling that the Clinton Administration interpreted the FDCA differently than its predecessor. The problem arose because the incumbent FDA sought to expand its jurisdiction and regulate a product that the agency had never purported to regulate before. Specifically, it was the President driving the change, and not the technocratic agency discovering new evidence in the course of its daily routine. This discovery-and-reversal was policy all the way down. The Court’s decision in *Brown & Williamson*, Kagan explained, was a reaction to Clinton’s tobacco initiative, an example of newfound, “overly aggressive regulation.”<sup>268</sup>

Kagan recognized the risk this unitary-executive theory of administration poses, but held out judicial review as a valid check on possible abuses and excesses. This check only operates, however, when maladministration inflicts an injury. When no one is injured by maladministration, the discovery is insulated from judicial review. The next two examples involve Obamacare reversals-and-

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263. *Id.* at 186, 188.

264. *Id.* at 188.

265. *Id.* at 186, 188.

266. *Id.* at 188.

267. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

268. Kagan, *supra* note 1, at 2350. Perplexingly, *Brown & Williamson*—the clearest repudiation of Kagan’s theory, involving a regulation she personally worked on—is cited only once in 140 pages.



discoveries, which illustrate the risk when Kagan’s “simple, if sometimes imperfect solution”<sup>269</sup> is simply impossible.

### 3. “Violation of Article I of the Constitution”

During the drafting of the Affordable Care Act in the fall of 2009, Senator Chuck Grassley (R-IA) added an amendment that would require members of Congress and their employees to utilize the law’s new health insurance exchanges. “The more that Congress experiences the laws we pass,” Grassley said at the time, “the better the laws are likely to be.”<sup>270</sup> The statute provided that Congress could only offer elected Representatives and Senators, as well as their staffers, insurance plans that were “created under” the ACA, or “through an Exchange established under” the ACA.<sup>271</sup>

Before the ACA, members of Congress and their employers, like all other civil servants, received health insurance with the generous Federal Employees Health Benefits Plan (“FEHBP”).<sup>272</sup> Through FEHBP, 72% of an employee’s premium—between \$5,000 and \$12,000 annually—was contributed by the government.<sup>273</sup> This tax-free subsidy was far greater than the subsidies available on the means-tested ACA exchanges. Further, the overwhelming majority of congressional employees with household annual incomes above 400% of the federal poverty line (\$97,000 for a family of four) would not be eligible for *any* subsidies on the exchange.<sup>274</sup> Under the Grassley Amendment, these well-compensated workers would be in the same boat as the rest of Americans whose employers do not provide generous insurance.

The healthcare bill moving on a parallel track in the House of Representatives rejected this proposal and would have allowed staffers to remain on FEHBP.<sup>275</sup> After the election of Senator Scott Brown (R-MA) in January 2010, the Democrats lost their filibuster-proof majority.<sup>276</sup> House Democrats were forced to vote on the Senate bill with the Grassley Amendment, whether they liked it or not. “We had to take the Senate version of the health care bill,” explained Representative Diana DeGette (D-CO), who supported the ACA. “This is not anything we spent time talking about here in the House,” she noted.<sup>277</sup> An anonymous Democratic representative told the *New York Times*, “[t]his was a stupid provision that never should have gotten into the law.”<sup>278</sup> Ezra Klein, a

269. *Id.*

270. *Grassley amendment makes Congress obtain coverage from health care plan established in reform bill*, GRASSLEY.SENATE.GOV (Sept. 30, 2009), <https://perma.cc/P55Z-EHD5>.

271. 42 U.S.C. § 18032 (d)(3)(D) (2010).

272. OFFICE OF PERS. MGMT., GUIDE TO FEDERAL BENEFITS FOR FEDERAL CIVILIAN EMPLOYEES, 8 (2015).

273. *Id.* at 9.

274. 2016 Federal Poverty Level, OBAMACARE.NET, <https://obamacare.net/2016-federal-poverty-level> (last visited Jan. 15, 2018).

275. *See* OFFICE OF PERS. MGMT., *supra* note 272.

276. Ewan MacAskill, *Republicans take Ted Kennedy’s seat in dramatic upset*, THE GUARDIAN, (Jan. 20, 2010, 7:42 AM), <https://www.theguardian.com/world/2010/jan/20/republicans-massachusetts-scott-brown-obama-health>.

277. Robert Pear, *Wrinkle in Health Law Vexes Lawmakers’ Aides*, N.Y. TIMES (July 29, 2013), <http://www.nytimes.com/2013/07/30/us/politics/wrinkle-in-health-law-vexes-lawmakers-aides.html>.

278. *Id.*

prominent supporter of the ACA, later wrote that “[t]his was an offhand amendment,” and a “drafting error,” “that was supposed to be rejected.”<sup>279</sup> But it wasn’t.

Unsurprisingly, this provision was extremely unpopular on Capitol Hill. Because the federal government could not contribute towards their premiums, Klein observed, “a lot of staffers [may] quit[] Congress because they can’t afford to shoulder 100 percent of” the cost.<sup>280</sup> (They, and millions of other Americans who could not afford the skyrocketing Obamacare premiums because they did not receive subsidies). In April 2013, a White House spokesman announced that the administration’s hands were tied: “Members of Congress will not receive anything that is not available to the public. The law doesn’t allow them to get insurance from FEHB, they are going to get insurance on the market place, just like individuals uninsured and small businesses.”<sup>281</sup> But this position was not final. As Klein pointed out, the Office of Personnel Management (“OPM”)—which administers FEHBP—had not yet “rule[d] on [its] interpretation of the law.”<sup>282</sup> Over the next five months, presidential maladministration kicked into high gear.

In May 2013, Senate Majority Leader Harry Reid (D-NV) conceded that there was a “conflict” over contributions to the health insurance policies of Hill employees.<sup>283</sup> Reid said, “[w]e’re trying to work that out” with House Speaker John Boehner (R-OH).<sup>284</sup> According to *Politico*, during the summer of 2013, Boehner and Reid quietly collaborated to develop a “legislative fix” so that the federal government would continue to provide a 72% contribution towards insurance premiums.<sup>285</sup> The duo even personally lobbied President Obama at the White House, while using a cover story so as not to arouse suspicions.<sup>286</sup> This nascent bipartisan effort quickly hit a brick wall as Republican leadership abandoned any effort to amend the ACA, short of a full repeal.<sup>287</sup>

When a legislative solution no longer looked viable, the President reversed and discovered the power to do precisely what the bipartisan amendment would have accomplished: provide the same level of subsidies to congressional employees. Press accounts addressed the President’s personalized administration over this matter. *Politico* reported that in response to congressional gridlock, President Obama became “personally involved in the dispute.”<sup>288</sup> Senator Dick Durbin (D-IL) relayed, “[t]he president is aware of it. His people are working on

279. Ezra Klein, *No, Congress Isn’t Trying to Exempt Itself from Obamacare*, WASH. POST (Apr. 25, 2013), <https://perma.cc/G22A-K78M>.

280. *Id.*

281. Emily Ethridge, *Health Insurance Anxiety on Capitol Hill*, ROLL CALL (Apr. 25, 2013, 11:40 AM), <https://perma.cc/3ZCT-8KT3>.

282. Klein, *supra* note 279.

283. Alexander Bolton, *Reid: More Funding Needed to Prevent ObamaCare from Becoming ‘Train Wreck,’* HILL (May 1, 2013, 9:45 PM), <https://perma.cc/LW3Y-5LWY>.

284. *Id.*

285. John Bresnahan, *Boehner’s Fight for Hill Subsidies*, POLITICO (Oct. 1, 2013, 10:36 AM), <https://perma.cc/V2L7-A6S7>.

286. *Id.*

287. *Id.*

288. *Id.*

it.”<sup>289</sup> Senator Barbara Mikulski (D-MD) specifically called for the president to act unilaterally. She explained that Democrats were “looking at what we can do with it administratively.”<sup>290</sup> President Obama would do just that, turning to presidential maladministration to provide the subsidies Congress would not.

On September 30, the Obama Administration formally *reversed* its previous position that members of Congress would not receive anything that would not be available to the public, and *discovered* the power to provide the *exact* same level of subsidies that staffers previously received. To accomplish this goal, the White House coordinated a sophisticated executive action across two agencies, commonly referred to as the *OPM Fix*.

First, OPM concluded that members of Congress and their employers were eligible to purchase insurance on the District of Columbia’s Small Business Health Options Programs, known as the D.C. SHOP exchange.<sup>291</sup> The Affordable Care Act authorized the SHOP exchanges to provide a marketplace for small businesses with fewer than fifty-one employees, which were not subject to the employer mandate.<sup>292</sup> It tortures the English language to reason that Congress is in any sense a business.<sup>293</sup> Further, even accepting that premise, it is not small—the House of Representatives and the Senate, combined, employed more than 20,000 employees.<sup>294</sup> How did OPM reach this conclusion? Rather than viewing the entire Congressional workforce as a small business—which it was certainly not—CMS and OPM chopped up the Capitol into hundreds of distinct offices, each deemed its own small business—which they certainly were not.<sup>295</sup> On its own terms, this interpretation still does not really work. Even assuming that each office within Congress should be treated differently, the Speaker of the House, for example, had sixty-one employees in the summer of 2013.<sup>296</sup> The government’s construction makes a mockery of the ACA.

To address this glaring inconsistency, the Centers for Medicare and Medicaid Services (“CMS”) blog answered a new *Frequently Asked Question*,<sup>297</sup> stat-

289. John Bresnahan & Jake Sherman, *Obama on Hill’s ACA Mess: I’m on it*, POLITICO (July 31, 2013, 7:04 AM), <https://perma.cc/L3U8-ZRYT>.

290. *Id.*

291. Federal Employees Health Benefits Program: Members of Congress and Congressional Staff, 78 Fed. Reg. 60,653, 60,653–54 (Oct. 2, 2013) (to be codified at 5 C.F.R. pt. 890).

292. 42 U.S.C. § 18024(b)(2) (2012) (“The term ‘small employer’ means, in connection with a group health plan with respect to a calendar year and a plan year, an employer who employed an average of at least 1 but not more than 50 employees on business days during the preceding calendar year and who employs at least 1 employee on the first day of the plan year.”); 45 C.F.R. § 155.710(b) (2016).

293. *Vital Statistics on Congress Chapter 5: Congressional Staff and Operating Expenses*, BROOKINGS.EDU (July 11, 2013), <https://bit.ly/1T5nDFI>.

294. *Id.*

295. Melissa Quinn, *What You Need to Know About the Fight to Make Members of Congress Enroll in Obamacare*, DAILY SIGNAL (Jan. 9, 2015), <http://dailysignal.com/2015/01/09/need-know-fight-make-members-congress-enroll-obamacare/>.

296. *House Staff Directory—Office of the Speaker*, SUNLIGHT FOUNDATION (Aug. 27, 2016, 5:26 PM), <https://perma.cc/L3PZ-B5YX>.

297. Ctrs. for Medicare & Medicaid Servs., *Members of Congress and Staff Accessing Coverage through Health Insurance Exchanges (Marketplaces)*, (Sept. 30, 2013), <https://bit.ly/1q51qtL>.

ing “that offices of the Members of Congress, as qualified employers, are eligible to participate in a SHOP *regardless of the size*.”<sup>298</sup> The government’s explanation could not be reconciled with the ACA, which explicitly provides that “[t]he term ‘small employer’ means . . . an employer who employed an average of at least 1 but not more than 50 employees.”<sup>299</sup> This FAQ—an exercise of what I’ve referred to as “government by blog post”<sup>300</sup>—was flatly contrary to the statute. It gets worse.

OPM further announced that after a congressional employee enrolled on the D.C. Small Business exchange—even though Congress was not a small business, and regardless of whether an individual office had more than fifty-one employees—the government could then provide the *exact same* 72% contribution that was offered under the FEHBP.<sup>301</sup> Thus, there would be no meaningful disruption in benefits for members and Hill staffers. Note that no other employees on the D.C. SHOP exchange would receive such a significant tax-free benefit. Notwithstanding the Grassley Amendment, which expressly sought to put congressional employees on the *same* footing as Americans on the exchanges, now congressional employees would be in the *exact same* position as they were before the enactment of the ACA. This exercise of presidential maladministration yielded an arbitrary, capricious, and indeed illegal discovery of *ultra vires* power.

In her article, Professor Kagan recognizes that the “simple, if sometimes imperfect, solution” to an abuse of power is “judicial review of agency action, including action that the President orders.”<sup>302</sup> When the President directs an agency to take a lawless action, for purposes of Article III and the APA, “the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency’s action should govern.”<sup>303</sup> Because Kagan views the courts as “remain[ing] open to legal challenges,” her concerns are assuaged that presidential administration can “too greatly displace the clear preferences of the prior enacting (as opposed to the current overseeing) Congress with respect to agency action.”<sup>304</sup> That is, if the current Congress is unable to stop the President from interpreting a statute in a way contrary to its framers’ original understanding—or in the case of the OPM fix, the administration ignores a statute so staffers maintain their benefits—the courts could serve that role. Except they couldn’t.

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298. *Id.*

299. 42 U.S.C. § 18024(b)(2) (2012).

300. See Josh Blackman, *Government by Blog Post*, 11 F.I.U. L. REV. 389, 401 (2016). A sole FAQ by itself cannot be the source of legal authority. In a different case, a federal court ruled that CMS could not rely on a Frequently Asked Question on their blog as the basis to support a change in policy. The court found that because FAQ 33 was the “sole authority” for the government’s decision, it has to be set aside as unlawful. *Texas Children’s Hosp. v. Burwell*, 76 F. Supp. 3d 224, 238 (D.D.C. 2014).

301. 5 C.F.R. § 890.501(h) (2016).

302. Kagan, *supra* note 1, at 2350.

303. *Id.* at 2351.

304. *Id.*

In 2014, Senator Ron Johnson (R-WI) filed suit, alleging that the OPM fix was illegal and contrary to the clear text of the Affordable Care Act.<sup>305</sup> “OPM exceeded its statutory jurisdiction and legal authority,” Johnson wrote in the *Wall Street Journal*.<sup>306</sup> Specifically referencing this exercise of maladministration, he wrote that “[i]n directing OPM to” take this action, “President Obama once again chose political expediency instead of faithfully executing the law—even one of his own making.”<sup>307</sup> Article II imposes on the President a duty to “take care that the laws be faithfully executed.”<sup>308</sup>

The critical barrier for Johnson’s suit, however, was “standing.” Article III of the Constitution defines the bounds of the federal courts’ limited jurisdiction: they can hear only actual “cases” or “controversies.”<sup>309</sup> To have standing, a plaintiff “must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”<sup>310</sup> The Supreme Court has recognized standing as a means to keep purely ideological suits—that is where no one is injured—out of the federal judiciary. This doctrine serves to preserve the independence of the courts; unless a plaintiff is injured and the court can provide relief, it is not a matter for judicial review.

After Johnson’s suit was filed, the government filed a motion to dismiss, asserting that the court lacked jurisdiction. The government offered no defense of the substance of the case. Left with little choice under existing doctrine, the district court dismissed the case on standing grounds.<sup>311</sup> Senator Johnson, as well as his staffer who served as co-plaintiff, *benefitted* from the OPM Fix. Were it not in place, both would have had to pay more money for insurance. As a result, they were not injured and they lacked standing.

Despite the fact that Johnson could not establish standing, District Court Judge William C. Griesbach was troubled by what he saw as illegal executive action.<sup>312</sup> Taking the allegations “as true,” he wrote, the “executive branch has rewritten a key provision of the ACA so as to render it essentially meaningless in order to save members of Congress and their staffs from the consequences of a controversial law that will affect millions of citizens.”<sup>313</sup> Allowing the president to rewrite the law and not enforce other requirements “would be a violation

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305. Johnson v. Office Pers. Mgmt., 783 F.3d 655 (7th Cir. 2015).

306. Ron Johnson, *I’m Suing Over ObamaCare Exemptions for Congress*, WALL ST. J. (Jan. 5, 2014, 6:06 PM), <https://www.wsj.com/articles/i8217m-suing-over-obamacare-exemptions-for-congress-1388963150?tesla=y>.

307. *Id.*

308. U.S. CONST. art. II, § 3; see also Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 215 (2015); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014).

309. U.S. CONST. art. III, § 2.

310. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citations omitted).

311. Decision and Order Granting Motion to Dismiss at 2, 20, Johnson v. Office Pers. Mgmt. (E.D. Wis. 2014) (14-CV-009).

312. *Id.* at 1.

313. *Id.* at 18–19.

of Article I of the Constitution, which reposes the lawmaking power in the legislative branch.”<sup>314</sup> Although the scope of the change is minor, Griesbach concluded, “the violation alleged is not a mere technicality.”<sup>315</sup> The Seventh Circuit affirmed the dismissal of the case on standing grounds, but did not address the underlying constitutional issue.<sup>316</sup> Johnson never bothered to seek certiorari.

No court would ever invalidate the illegal OPM fix, which persists to this day, without any statutory basis. (I have suggested that President Trump can threaten to rescind it as an effective cudgel to revisit the ACA.<sup>317</sup>) When presidential discovery confers substantive benefits on parties, but injures no one, judicial review is not a “sufficient check against this danger.”<sup>318</sup> The “simple, if sometimes imperfect, solution” Kagan championed was simply unavailable. In another Obamacare reversal-and-discovery, however, a court would find standing.

#### 4. House of Representatives v. Burwell

With respect to the OPM fix, we have—at best—circumstantial evidence of presidential maladministration, which was gleaned through press accounts. Professor Kagan aptly observed that “[b]ureaucracy is the ultimate black box of government” because the “bureaucratic form—in its proportions, its reach, and its distance—is impervious to full public understanding, much less control.”<sup>319</sup> *House of Representatives v. Burwell*,<sup>320</sup> however, pierced this bureaucratic veil. Through its oversight power, the Republican majority in the House of Representatives conducted a thorough and rigorous investigation into the executive branch’s cost sharing reduction (“CSR”) payments to insurance companies. The documents revealed that the Obama Administration overruled and reversed career civil servants who initially concluded that Congress had not appropriated funds for the CSR program. The highest levels of the executive branch—including the Attorney General, Secretary of the Treasury, and IRS Commissioner—discovered and approved a new permanent funding source that was not subject to sequestration. The IRS’s Chief Risk Officer, a ten-year veteran of the agency, maintained that this spending was unsupported by the ACA, but the cabinet overruled him. This case, perhaps more than any other discussed in this Article, illustrates with precision the risks of maladministration and demonstrates why courts should withhold deference for presidential reversals and discoveries.

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314. *Id.* at 19.

315. *Id.*

316. *Johnson v. Office Pers. Mgmt.*, 783 F.3d 655, 669 (7th Cir. 2015)

317. Josh Blackman, *A Blueprint for Repealing and Replacing Obamacare with Bipartisan Support*, NAT’L REV. (Nov. 11, 2016), <http://www.nationalreview.com/article/442120/obamacare-repeal-republicans-should-ensure-health-care-reform-bipartisan>.

318. Kagan, *supra* note 1, at 2347.

319. *Id.* at 2332.

320. *U.S. House of Reprs. v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015).

## a. Cost Sharing Reduction Program

The Affordable Care Act employs two forms of subsidies to reduce the costs of health insurance. Section 1401 of the ACA provides subsidies directly to consumers to reduce the cost of premiums.<sup>321</sup> (The Supreme Court upheld the payment of these subsidies on federally established exchanges in *King v. Burwell*.)<sup>322</sup> Section 1402 offsets certain “cost sharing” payments that insurance companies charge customers, such as deductibles and copays.<sup>323</sup> (For simplicity’s sake, I will also refer to the latter as the “CSR program”). Congress approached these sections differently. The legislative branch explicitly funded Section 1401 payments through a permanent appropriation to ensure that the subsidies will always flow. Congress, however, did not create a separate appropriation for Section 1402.

Career civil servants in the Departments of Treasury and Health and Human Services (“HHS”) originally understood the statute to require Congress to create a new line item in the annual budget for the CSR payments.<sup>324</sup> In 2012, the Treasury Department concluded that Congress did not appropriate any funds for the CSR program.<sup>325</sup> A Treasury memorandum at the time stated that “there is currently no appropriation to Treasury or to anyone else, for purposes of the cost-sharing payments to be made under section.”<sup>326</sup> In January 2013, Treasury and HHS signed a memorandum of understanding providing that there was an appropriation for Section 1401, but the memorandum was silent about Section 1402.<sup>327</sup>

In April 2013, the Obama Administration’s budget request reflected this original understanding of the statute. The Centers for Medicaid and Medicare Services (“CMS”), a division of HHS, requested \$1.4 billion for fiscal year 2014 to “carry[] out . . . section 1402.”<sup>328</sup> HHS explained in its budget justification for fiscal year 2014 that it required a new “annually appropriated” account for the CSR program, totaling \$1.4 billion.<sup>329</sup> But then came the reversal-and-discovery.

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321. *Id.* at 59–60.

322. *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015).

323. *U.S. House of Reps.*, 130 F. Supp. 3d at 60.

324. STAFF OF H.R. COMM. ON ENERGY AND COM. AND STAFF OF H.R. COMM. ON WAYS AND MEANS, 114TH CONG., J. CONG. INVESTIGATION REP. INTO THE SOURCE OF FUNDING FOR THE ACA’S COST SHARING REDUCTION PROGRAM 23–29 (Comm. Print 2016) [hereinafter OVERSIGHT]. Recognizing that this report was prepared by the Republican Majority Staff of the Committees on Ways and Means and Energy and Commerce, I endeavor to rely on the primary sources and sworn testimony, rather than the Committees’ conclusions.

325. *Id.* at 25.

326. *Id.*

327. *Id.* at 28–29.

328. OFFICE OF MGMT. & BUDGET, FISCAL YEAR 2014 BUDGET OF THE U.S. GOV’T, App. at 448 (Apr. 10, 2013), <https://bit.ly/22E5dwt>.

329. DEP’T OF HEALTH & HUM. SERVS, FISCAL YEAR 2014, CENTERS FOR MEDICARE & MEDICAID SERV., JUSTIFICATION OF ESTIMATES FOR APPROPRIATIONS COMM. at 4, 7, 183–84 (2014), <https://bit.ly/1WzOGtH>.

Due to the sequestration that was in effect for fiscal year 2014, nondefense mandatory programs were cut by 7.2%.<sup>330</sup> As a result, insurers would only receive ninety-three cents on the dollar for CSR payments; however, they would still be required to pay the full amount of cost sharing under the terms of the ACA.<sup>331</sup> OMB acknowledged that the CSR program would be subject to sequestration.<sup>332</sup> What happened next is at once both clear and murky.

During oral arguments in *House of Representatives v. Burwell*, the Justice Department represented that the budget request for the CSR program was “later withdrawn because the administration took a second look and realized that there were principles of appropriations law that made the request unnecessary.”<sup>333</sup> After an unusual request from the district court to identify “any action by the Defendant(s) to withdraw the funding request for Section 1402,”<sup>334</sup> the government replied that there was not a “separate formal withdrawal document” for fiscal year 2014, “and apologizes for being unclear on that point.”<sup>335</sup> Rather, there was an informal request.

In June or July 2013 (exactly when is unclear), Ellen Murray, the Assistant Secretary for Financial Resources within HHS, called the Senate Committee on Appropriations “and said they would not need an appropriation for the Cost Sharing Reduction Program.”<sup>336</sup> Ms. Murray added that “there was already an appropriation for the program, and we did not need the bill to include one.”<sup>337</sup> Ms. Murray could not cite any other example of HHS informally withdrawing a budgetary request over the phone, without any written record.<sup>338</sup> In July 2013, as requested, the Committee on Appropriations for the Departments of Health and Human Services, chaired by Senator Tom Harkin (D-IA), removed the funding request.<sup>339</sup> Note that this was not the usual case of Republicans blocking Obamacare funding for insurance companies—the Democrats agreed to cut the line item.

The White House’s fingerprints were all over this reversal. Ms. Murray admitted that she spoke with someone from the “Executive Office of the President” concerning the appropriation issue.<sup>340</sup> The Ways and Means Committee inquired if representatives from HHS had conversations with the White House. The HHS General Counsel objected to the question. “We have certain Executive

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330. *Frequently Asked Questions about Sequestration*, H.R. COMM. ON THE BUDGET (Jan. 15, 2015), <https://perma.cc/57Q9-L6MK>.

331. OVERSIGHT, *supra* note 324, at 43.

332. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB SEQUESTRATION PREVIEW REPORT TO THE PRESIDENT AND CONGRESS FOR FISCAL YEAR 2014 AND OMB REPORT TO THE CONGRESS ON THE JOINT COMMITTEE REDUCTIONS FOR FISCAL YEAR 2014 (April 10, 2013).

333. Transcript of Oral Argument at 23, *U.S. House of Reps. v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. May 28, 2015) (No. 14-1967), <https://bit.ly/2bz1Tzm>.

334. Minute Order, *U.S. House of Reps.*, 130 F. Supp. 3d 53 (No. 14-1967) (emphasis added).

335. *U.S. House of Reps.*, 130 F. Supp. 3d at 62 n.7.

336. OVERSIGHT, *supra* note 324, at 45–46.

337. *Id.* at 46.

338. *Id.* at 47.

339. S. REP. NO. 113-71 at 123 (2013).

340. OVERSIGHT, *supra* note 324, at 50.



Branch confidentiality interests.”<sup>341</sup> Another HHS employee was asked the same question, and the HHS attorney objected: “we are getting into areas that involve presidential advisors and staff and the confidentiality interests are only heightened.”<sup>342</sup> To summarize, between April 10 (when the administration made the request) and July 11 (when the Senate removed the request), Ms. Murray discussed the appropriation with the Executive Office of the President and called the Senate Committee on Appropriations to informally withdraw the request.<sup>343</sup>

The impetus for this reversal was a quintessential exercise of maladministration. This is not even a reversal from a previous administration—as Reagan did to Carter’s environmental rules in *Chevron*. Here, the Obama Administration reversed itself. Specifically, the White House overruled the conclusion of career civil servants after concluding that the policy results were undesirable. The White House was attempting to solve one problem—ensuring the insurance companies received 100% of the CSR payments. But in the process the administration created a far more severe problem—spending billions of dollars without an appropriation.

b. “Risk”

In May 2016, counsel from the Ways and Means Committee deposed David Fisher, who served as the IRS’s Chief Risk Office when the agency was considering the appropriations for the CSR program.<sup>344</sup> This deposition provides unparalleled insights into the bureaucratic “black box”—and portrays a troubling portrait of maladministration. The IRS’s “original understanding” of Section 1402, Fisher explained, “was that these funds were going to be [annually] appropriated funds and, therefore, subject to the sequester.”<sup>345</sup> That is, the executive branch would have to request a new appropriation each year. But there was a “shift,” Fisher recalled, and HHS’s initial budget request “had been withdrawn.”<sup>346</sup> At some point during the summer of 2013, OMB concluded in a memorandum that the appropriation for Section 1401 would also cover the CSR payments under Section 1402. The career civil servant noted that there was “potential concern about these payments.”<sup>347</sup>

Fisher explained that “in all previous instances” when Congress wanted to create a “permanent appropriation,” there was a “discrete update to the Internal Revenue Code.”<sup>348</sup> For example, “section 1401 of the Affordable Care Act creates section 36B of the Internal Revenue Code,” which established the permanent appropriation for the subsidies at issue in *King v. Burwell*.<sup>349</sup> Even during

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341. *Id.* at 60–61.

342. *Id.* at 134–35.

343. *Id.* at 51.

344. Dep. of David Fisher at 1, *U.S. House of Reps. v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. 2015), <https://www.scribd.com/document/313813334/Fisher-Deposition-House-v-Burwell>.

345. *Id.* at 16.

346. *Id.* at 17.

347. *Id.* at 13.

348. *Id.* at 49–50.

349. *Id.*

a government “shutdown,” these payments would continue. While the funding for Section 36B was “discretely articulated in” the ACA, Fisher noted, “there was no clear reference in the section regarding the cost-sharing reduction (CSR) payments to the Internal Revenue Code in the Affordable Care Act.”<sup>350</sup> The Section 1402 “cost-sharing reduction payments are not linked to the Internal Revenue Code, as far as I could tell, directly anywhere.”<sup>351</sup> In light of this “risk,” and the fact that the statute was “at best unclear,” Fisher was “looking for the administration’s perspective on this.”<sup>352</sup>

This discovery of the new funding source was approved by the highest echelons of the Obama Administration. Ms. Geovette Washington, the OMB General Counsel, personally briefed Attorney General Eric Holder on the decision.<sup>353</sup> Fisher recalled that “it stood out in [his] mind” that she personally “had an opportunity to brief the Attorney General himself.”<sup>354</sup> Treasury Secretary Jacob Lew also personally signed off on an “action memorandum” providing that the IRS would administer the “cost-sharing payments in coordination with HHS.”<sup>355</sup> Fisher noted that Treasury’s Counsel “had concluded that these payments were appropriate.”<sup>356</sup> It was “signed and initialed ‘Approve’” by Secretary Lew.<sup>357</sup> The Treasury memorandum was obtained through a subpoena, but the analysis portion was redacted.

By December 2013, “it became clear” to Fisher “that . . . the [administration’s] intent was to use the permanent appropriation [for Section 1401] to pay the cost-sharing reduction payments [under Section 1402].”<sup>358</sup> Fisher requested an invitation to attend a meeting with other IRS officials at the Old Executive Office Building—across the street from the White House—on January 13, 2014. He determined that “there was at least some risk here and it was appropriate for the Chief Risk Officer [to] be involved in the discussion.”<sup>359</sup> Fisher explained that the “risk” was “whether or not the utilization of the permanent appropriation for the cost-sharing program had been appropriately appropriated by the law.”<sup>360</sup>

It was a most unusual meeting. “We were given [an OMB] memo to read,” Fisher recalled, but “we were instructed we were not to take notes and we would not be keeping the memo, we’d be giving it back at the end of the meeting.”<sup>361</sup> There “was no real explanation as to why we couldn’t keep the memo,” Fisher said.<sup>362</sup> It “was just simply stated.”<sup>363</sup> This secrecy “was not a common practice”

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350. *Id.* at 50.

351. *Id.* at 59.

352. *Id.* at 50, 54.

353. *Id.* at 31, 35–36.

354. *Id.* at 32.

355. OVERSIGHT, *supra* note 324, at 76–77.

356. Dep. of Fisher, *supra* note 344, at 39.

357. *Id.*

358. *Id.* at 22.

359. *Id.* at 25.

360. *Id.* at 26.

361. *Id.*

362. *Id.* at 46.

363. *Id.* at 48.

in Fisher's "10 years in government at the three agencies where [he] worked."<sup>364</sup> Other than dealing with classified information at the Department of Defense, he could not "recall another occurrence" of being unable to keep a memorandum.<sup>365</sup> Fisher speculated that the cloak-and-dagger protocol was triggered because the administration "wanted to have some kind of contained distribution for whatever purpose. I don't know their purpose. They clearly wanted to have that information only shared with a select group of folks."<sup>366</sup> It was "a little unusual," he said.<sup>367</sup> Further, while Fisher usually takes copious notes, he "took no notes in the meeting at OMB because [he was] told not to take notes."<sup>368</sup>

The memo, which Fisher was not allowed to retain a copy of, "justif[ied] the payments out of the [Section 1401] permanent appropriation."<sup>369</sup> He described the memo as a "lengthy . . . list of small justifications of individual things trying to identify why the administration believed that it was Congress's intent to have the payments for both" Sections 1401 and 1402 to be "made in the same manner."<sup>370</sup> For example, there were "allusions" to statements made on the floor and statements made in the media.<sup>371</sup> But "there was no sort of single, main argument."<sup>372</sup> Instead there was a "collection of . . . elements that in total, would draw the conclusion that these payments out of the permanent appropriation would be appropriate."<sup>373</sup> Congress was never provided a copy of the OMB memo. Legislative "harassment" and "threat[ened] . . . sanctions," cudgels identified by Professor Kagan as a check on administration abuse, were unsuccessful.<sup>374</sup>

Throughout the deposition, Fisher carefully distinguished the work performed by career civil servants with decisions made by appointed officials. The "administration," Fisher said, "has gone through the legal analysis and has come up with the opinion that, based on the information contained in this memo, it was appropriate to use the permanent appropriation."<sup>375</sup> His comments specifically address how presidential administration of the Kagan variety affected the CSR payments.

After the meeting with OMB, Fisher said his "group was not in consensus on the merits of the argument as conveyed to us through the memo."<sup>376</sup> Fisher advocated to "set[] up a meeting with the Commissioner of the IRS to make sure he's fully informed."<sup>377</sup> Fisher said that their job was to "identify potential risks"

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364. *Id.* at 47.

365. *Id.*

366. *Id.* at 48.

367. *Id.* at 69.

368. *Id.* at 70.

369. *Id.* at 26.

370. *Id.* at 27.

371. *Id.*

372. *Id.* at 28.

373. *Id.*

374. Kagan, *supra* note 1, at 2347.

375. Dep. of Fisher, *supra* note 344, at 29.

376. *Id.* at 33.

377. *Id.*

that “require senior-level engagement.”<sup>378</sup> This case was particularly suited for the escalation because Fisher “had concerns about the analysis in the memo.”<sup>379</sup>

Fisher joked, “I know it’s hard to believe for some people,” but “this was not about health care” for him.<sup>380</sup> It was “about appropriations law.”<sup>381</sup> He noted that they take “very seriously” the Antideficiency Act, which imposes “criminal penalties” for spending money without proper authorization.<sup>382</sup> “[W]e wanted to make sure that these payments were not going to be in violation of appropriation law and the Antideficiency Act,” Fisher said.<sup>383</sup> “That’s what this was all about.”<sup>384</sup>

It was “not unusual” for there to be disagreements about appropriations law, Fisher acknowledged, but “this was probably a stronger disagreement than is typical.”<sup>385</sup> It “did not occur very often, that it would get to [the IRS Commissioner John Koskinen’s] level.”<sup>386</sup> Fisher praised Koskinen for hosting a “free and open discussion,” and giving him “plenty of time to air [his] concerns.”<sup>387</sup> He soon sensed, however, that there was a “very strong consensus” at the meeting from “fairly senior positions in government that these payments were appropriate.”<sup>388</sup> The “position [that] carried the day” was that the appropriation was “implied,” or an “intermingled requirement.”<sup>389</sup>

The Chief Risk Officer remained in “dissent,” because he saw “some risk to making these payments with respect to the appropriations law and the Antideficiency Act . . . .”<sup>390</sup> He told those in attendance that “the memo that we read was not compelling to me to counter my concerns about the appropriations . . . .”<sup>391</sup> Fisher “read the law over and over again to try to convince myself, you know, what’s the appropriate reading of this, recognizing that many others have now come to a different conclusion.”<sup>392</sup> But he was still in dissent. Ultimately—and not surprisingly—Koskinen sided with the administration officials.<sup>393</sup>

### c. “Torpor”

This episode represents a case study in both presidential administration and presidential maladministration. Professor Kagan would likely celebrate this process as an exemplar of how the White House can control the regulatory process and ensure a dynamic, flexible approach to solving unexpected circumstances:

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378. *Id.*

379. *Id.* at 34.

380. *Id.*

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.* at 68.

386. *Id.*

387. *Id.* at 38–40.

388. *Id.* at 39.

389. *Id.* at 60.

390. *Id.* at 39.

391. *Id.* at 40.

392. *Id.*

393. *Id.*

in this case, how to reinterpret the law to ensure that insurers received full reimbursements, notwithstanding the sequestration. Here, the Attorney General, Secretary of the Treasury, and IRS Commissioner *personally* signed off on an interpretation of the President's signature legislation—an interpretation that would allow insurance companies to provide subsidized insurance. Why shouldn't courts cheerfully defer to this high-level decision-making process? For two primary reasons, this episode illustrates the worst aspects of maladministration and demonstrates why courts should withhold deference from such upper-brass nudging.

First, the high-ranking officials reversed the judgments of career civil servants who identified an unacceptable level of risk. Now it is certainly true that bureaucrats have an aversion to risk that is sometimes overkill. In *Presidential Administration*, the former White House attorney lamented that “the real inclination of bureaucratic cultures . . . is conservative in nature.”<sup>394</sup> Not conservative like Reagan, but conservative in the sense of following “inertia,” and hewing to traditional understandings of an agency's delegated powers.<sup>395</sup> Specifically, agencies grasping for greater appropriations, have a “greater dependence on Congress.”<sup>396</sup> In contrast, the “comparatively unitary, responsive, and energetic institution of the Presidency seems more likely than these organizations to deviate from accepted interpretations of delegation provisions.”<sup>397</sup>

Kagan derided this regulatory “torpor” or “rigidity” as “administrative ossification,” which are “inherent vices (even pathologies)” that are heightened by “political gridlock.”<sup>398</sup> As time progresses, she noted, agencies have “a diminished capacity to innovate and a correspondingly greater tendency to do what they always have done even in the face of dramatic changes in needs, circumstances, and priorities.”<sup>399</sup> Presidential administration “inject[s] . . . energy and leadership” so that “an inert bureaucracy encased in an inert political system” does not “grind inflexibly, in the face of new opportunities and challenges, toward (at best) irrelevance or (at worst) real harm.”<sup>400</sup>

This episode, however, illustrates the danger of ignoring the bureaucracy. Mr. Fisher's “torpor” is more accurately characterized as prudence and an aversion to breaking the law. Far from resisting the incumbent administration's policy choices, a team of career IRS employees, whose job is to dispassionately study appropriations law apart from the vicissitudes of politics, recognized that Congress did not fund the CSR program. This yielded a risk of an Antideficiency Act violation and potential criminal prosecutions by a future administration. They were not debating the correct way to interpret technical provisions of the Clean Air Amendments or a requirement to promote driver safety with passive

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394. Kagan, *supra* note 1, at 2350.

395. *Id.* at 2263.

396. *Id.* at 2350 n.398.

397. *Id.* at 2350.

398. *Id.* at 2341, 2344, 2263.

399. *Id.* at 2344.

400. *Id.*

restraints. Rather, the administration ignored warnings about black letter appropriations law to ensure that insurers were not squeezed by sequestration.

Fisher praised the IRS Commissioner, who he said “listened to my concerns and thanked me,” but “made the decision that I actually would expect him to make” as a “senior leader” advised by “his senior advisers.”<sup>401</sup> But the entire meeting was for naught. By January 2013, the Obama Administration had already withdrawn its budget request.<sup>402</sup> Even if Fisher changed Koskinen’s mind, it was already *too late* to secure funding for the program for 2014. Further, by January 2013, the decision was already reviewed by the Attorney General and Treasury Secretary.<sup>403</sup> There was no doubt that the administration was going to do what the administration wanted to do, regardless of the risk. The review process was preordained. The meeting was for show.

Second, the notion that this decision created *accountability*—Kagan’s primary attribute of administration—because it was signed off by high-level officials is implausible. During Fisher’s deposition, Representative Jim McDermott (D-WA) offered an illuminating yet disquieting commentary about congressional obliviousness of the regulatory process: “Mr. Fisher, I want to thank you for coming and talking about how decisions are made inside the bureaucracy. We write laws out here, and then they get implemented, and sometimes we’re not aware exactly how it works.”<sup>404</sup> You and me both. Neither Congress nor the public has any clue what transpires inside the black box. Only through partisan subpoenas, oversight hearings, and depositions, which the ranking member referred to as “unprecedented,” was this narrative revealed.<sup>405</sup> And even then, the pivotal OMB memorandum was *never* provided to Congress—nor was it provided to IRS employees. They could only review it without taking notes.

Mark Mazur, the Treasury Assistant Secretary for Tax Policy who prepared the memorandum for the Secretary of the Treasury, was also deposed. But he “had only a minimal recollection of the details surrounding the purpose and creation of the document.”<sup>406</sup> Mazur’s testimony before the House Ways and Means committee was similarly unhelpful. His inability to answer questions frustrated any investigation of how the decision was reached. Contrary to Professor Kagan’s admonition, there is seldom accountability for presidential administration, beyond media plaudits following Rose Garden press conferences.

Even when Senators asked OMB Secretary Sylvia Matthew Burwell why the request was withdrawn, and what “legal authority” allowed the agency to

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401. Dep. of Fisher, *supra* note 344, at 40.

402. Caitlin Owens, *Did the White House Overstep Appropriations Law to Pay Insurers?*, MORNING CONSULT (July 7, 2016), <https://morningconsult.com/2016/07/07/white-house-misuse-permanent-tax-law-pay-insurers/>.

403. Dep. of Fisher, *supra* note 344, at 31, 41.

404. *Id.* at 67.

405. *Id.* at 9 (“As we have expressed before, we strongly oppose this deposition. It’s unprecedented. It was done without any consultation with the minority. Also, it’s the same subject matter as a lawsuit begun by the very people who have undertaken this deposition—the same people. The House majority filed a lawsuit. It’s on the very same subject matter.”) (quoting Rep. Sandy Levin (D-MI)).

406. OVERSIGHT, *supra* note 324, at 77.

“take such action,” she provided a misleading answer.<sup>407</sup> The future HHS Secretary replied that the decision was made “to improve the efficiency in the administration of the subsidy payments,” but made no reference to her decision to use the Section 1401 appropriation for Section 1402.<sup>408</sup> Professor Kagan wrote that a “loud ‘fire alarm’ to a Congress controlled by the other party” would sound to indicate something was amiss.<sup>409</sup> Here, the alarm was silent. Indeed, the Administration went to great lengths—even preventing IRS attorneys from holding copies of memorandums—to keep this decision under wraps. This obstruction renders accountability impossible.

Further, the necessary reliance on oversight is perhaps an indication that something is awry. Under the conventional view, Kagan wrote, Congress rarely uses its “remaining levers or control,” including “serious oversight hearings.”<sup>410</sup> She notes, however, that “if the public choice theorists are correct, an increase in formal oversight may suggest the decline rather than the rise of congressional power.”<sup>411</sup> In other words, by the time Congress holds oversight hearings as its last resort—as happened here—the separation of powers have already faltered. In any event, the stultifying gridlock endemic to the relationship between the Obama White House and the Republican-controlled Congress has had at least one salutary effect: a seemingly endless number of oversight hearings that provide an unprecedented opportunity to test Kagan’s thesis about presidential administration.

On July 30, 2014, the House of Representatives voted along straight party lines—225 to 201—to authorize litigation against the President’s implementation of the ACA.<sup>412</sup> Four months later, *House of Representatives v. Burwell* was filed. The complaint alleged that billions of dollars in CSR payments were being spent without an appropriation.<sup>413</sup> The first hurdle, as in *Johnson v. OPM*,<sup>414</sup> was standing. The government filed a motion to dismiss, asserting that the court lacked jurisdiction.

A complete discussion of whether the House of Representatives has standing is beyond the scope of this Article. Rather, this episode demonstrates that evidence of presidential maladministration does not entitle the government’s interpretation of the ACA to heightened deference or a presumption of unreviewability. In his article criticizing Professor Kagan’s theory, Professor Shane imagines a “very unlikely imaginary scenario” which poses the “hardest question

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407. Letter from Sylvia M. Burwell, Dir., OMB, to Senators Ted Cruz and Michael Lee, at 4 (May 21, 2014), <https://bit.ly/1UjXcXx>.

408. *Id.*

409. Kagan, *supra* note 1, at 2348.

410. *Id.* at 2256.

411. *Id.* at 2259.

412. Final Vote Results for Agreeing on the Resolution, H.R. Res. 676, 113th Cong. (2014), [l.usa.gov/1YVn3J6](http://l.usa.gov/1YVn3J6).

413. Complaint at 23, *U.S. House of Reps. v. Burwell*, 130 F. Supp. 3d 53 (D.D.C. May 28, 2015) (No. 14-1967).

414. *Johnson v. Office Pers. Mgmt.*, 783 F.3d 655 (7th Cir. 2015).

that could face a court.”<sup>415</sup> Under this hypothetical, “an executive branch interpretation appears worthy of *Chevron* deference,” he posits, “but the record reveals that the agency is proffering the executive branch interpretation only because of White House pressure to abandon an agency-preferred interpretation that would actually itself have been worthy of *Chevron* deference.”<sup>416</sup> Shane writes that this scenario is “unlikely because it is improbable that the usual process of discovery in litigation would uncover such a scenario.”<sup>417</sup> But if such a situation were to arise, Shane argues that “subject to one exception, a court should defer to the proffered executive branch interpretation only if the court judges that interpretation actually superior to the agency’s abandoned interpretation.”<sup>418</sup> This approach is desirable, he writes, because “[a] legal regime that would allow a plausible White House legal interpretation to trump a superior agency interpretation would arguably incentivize substandard lawyering by both the agency and the White House.”<sup>419</sup>

Shane’s “unlikely” scenario has remarkably played out with the CSR program. The Administration was not merely choosing one policy over another, but in fact disregarded the agency’s original determination, hoping that it could not be halted in court. The combination of reversal and discovery should give the courts pause about the legitimacy of the CSR program, even if the government’s construction of the ACA may otherwise seem reasonable (which it is absolutely not).

### C. Presidential Nonenforcement

Presidential *discovery* and *nonenforcement* are two sides of the same maladministration coin. In both cases, the executive does something that was not done before. With *discovery*, the President exercises a new power that was heretofore unknown. With *nonenforcement*, the President abstains from exercising an old power that was heretofore established. Both are equally deleterious to the separation of powers, but the latter is far more pernicious. While exercising a new authority is presumptively reviewable—so long as standing is present—the Court has established a general presumption of unreviewability for abstention. In an oft-cited, but never-satisfied footnote in *Heckler v. Chaney*, the Court observed that it would only review the failure to enforce a law if “the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>420</sup> Beyond prudential considerations of reviewability—because parties are seldom if ever injured because of nonenforcement—such abnegation is insulated from judicial review.

I note at the outset that my use of the term *nonenforcement* here is not synonymous with an illegal suspension of the law in violation of the Take Care

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415. Shane, *supra* note 24, at 699.

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).



Clause in Article II, Section III. I have argued elsewhere, at some length, that the President's failure to enforce provisions of the Affordable Care Act and executive action on immigration—both premised on assertions of “prosecutorial discretion”—are unlawful.<sup>421</sup> That argument, however, is far beyond the scope of this Article. Rather, I use nonenforcement here in the far more narrow sense. Most, if not all laws, were drafted with the presumption that it would be impossible for the executive to enforce it in 100% of relevant cases, due to limited time, resources, and priorities. In this sense, all exercises of prosecutorial discretion are forms of nonenforcement. And, in almost all cases, this nonenforcement is perfectly lawful. This Article instead focuses on how maladministration affects the appropriate standard of judicial review for claims of nonenforcement.

Large scale decisions about prosecutorial discretion could not be made by a low-level bureaucrat, but instead would be resolved by the upper echelon of the executive branch. That is, nonenforcement that approaches abnegation could only be directed by presidential administration. The specter of this threat is heightened in the era of gridlocked government, where Congress declines to repeal statutes the President seeks to repeal. Nonenforcement attempts to achieve a similar result.

Two episodes of presidential nonenforcement—concerning the Affordable Care Act's mandate and President Obama's executive actions on immigration—illustrate why judicial review should not only be available, but ought to highly scrutinize this species of maladministration.

### 1. *The Administrative Fix*

The implementation of the Affordable Care Act buried a treasure trove of presidential nonenforcement. The Obama Administration exempted businesses from the employer mandate, granted an unknown number of hardship exemptions because the ACA made insurance too expensive, and allowed a never-ending number of customers to sign up for insurance after the deadline. The most patent and dubious exercise of nonenforcement, however, concerned exemptions from the individual mandate through the so-called *administrative fix*.

#### a. “If you like your insurance, you can keep your insurance.”

In late 2009 and early 2010, to assuage concerns about the hotly debated health reform bill, President Obama promised nearly two dozen times that “[i]f you like your insurance, you can keep your insurance.”<sup>422</sup> This promise, however, was impossible to keep due to regulations the Obama Administration promulgated, which made it harder to grandfather old plans.<sup>423</sup> And the White

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421. See Brief for the Cato Institute et al. as Amici Curiae Supporting Respondents, *United States v. Texas*, 579 U.S. \_\_\_ (2016) (No. 15-674), 2016 WL 1377723; BLACKMAN, UNRAVELED, *supra* note 222, at xvii; Josh Blackman, *The Constitutionality of DAPA Part I: Congressional Acquiescence to Deferred Action*, 103 GEO. L.J. ONLINE 96 (2015); Josh Blackman, *The Constitutionality of DAPA Part II*, *supra* note 308, at 237–67; Josh Blackman, *Immigration Inside the Law*, 55 WASHBURN L.J. 31 (2015).

422. BLACKMAN, UNRAVELED, *supra* note 222, at 186.

423. *Id.* at 191–93.

House knew it. According to an *NBC News* report, the government forecasted that “50 to 75 percent of the 14 million consumers who buy their insurance individually” would receive cancellation notices “because their existing policies don’t meet the standards mandated by the new health care law.”<sup>424</sup> Yet, the President continued to make this promise to promote the law.

During the fall of 2013, millions of cancellation notices were sent to consumers whose plans would not be grandfathered.<sup>425</sup> As the cancellation notices streamed into mailboxes nationwide, President Obama was reportedly “blindsided.”<sup>426</sup> A White House adviser told journalist Steven Brill that the President was “truly furious” and told everyone “this was a problem we brought on ourselves. We should have known this was coming.”<sup>427</sup> At first, his promise changed to “if you have or had one of these plans before the Affordable Care Act came into law and you really like that plan, what we said was you could keep it *if it hasn’t changed since the law was passed*.”<sup>428</sup> But this revision did not go over well and did nothing to help those whose policies were already cancelled. The *Washington Post* fact checker gave Obama “Four Pinocchios.”<sup>429</sup> *Politifact* dubbed the president’s promise the “Lie of the Year.”<sup>430</sup> In the face of this backlash against his administration’s own deliberate regulatory policy, President Obama reversed direction through the highest level of presidential maladministration.

b. “An idea that will help”

In a speech from the White House Press Room, President Obama announced an executive action that would come to be known as the *administrative fix* (not to be confused with the *OPM fix*).<sup>431</sup> “I completely get how upsetting this can be for a lot of Americans,” he said, “particularly after assurances they

424. The implementing regulations are found in Preservation of Right to Maintain Existing Coverage, 29 CFR 2590.715-1251 (2011), <https://www.law.cornell.edu/cfr/text/29/2590.715-1251> [<https://perma.cc/62KW-DX93>]. Impacts on the Individual Market, 75 Fed. Reg. 34,538, 34,553 (June 17, 2010), <https://perma.cc/YV5Q-DPF8>. Lisa Myers & Hannah Rappleye, *Obama Admin. Knew Millions Could Not Keep Their Health Insurance*, NBC NEWS (Oct. 28, 2013, 5:48 PM), <https://www.nbcnews.com/news/other/obama-admin-knew-millions-could-not-keep-their-health-insurance-f8C11484394> [<https://perma.cc/L4H3-HSNH>].

425. The exact number of cancellations has never been clearly established, although estimates range from 2 million to 5 million. BLACKMAN, UNRAVELED, *supra* note 222, at 194–95.

426. STEVEN BRILL, *AMERICA’S BITTER PILL* 367 (2015).

427. *Id.* at 368.

428. President Barack Obama, *Remarks by the President to ACA Coalition Partners and Supporters*, WHITE HOUSE (Nov. 4, 2013) (emphasis added), <https://obamawhitehouse.archives.gov/the-press-office/2013/11/04/remarks-president-aca-coalition-partners-and-supporters> [<https://perma.cc/F5T5-LN6V>].

429. Glenn Kessler, *Obama’s Pledge That ‘No One Will Take Away’ Your Health Plan*, WASH. POST (Oct. 30, 2013) [https://www.washingtonpost.com/news/fact-checker/wp/2013/10/30/obamas-pledge-that-no-one-will-take-away-your-health-plan/?utm\\_term=.5c4c4ecd5266](https://www.washingtonpost.com/news/fact-checker/wp/2013/10/30/obamas-pledge-that-no-one-will-take-away-your-health-plan/?utm_term=.5c4c4ecd5266) [<https://perma.cc/VMT8-3G2S>].

430. Angie Drobnic Holan, *Lie of the Year: ‘If You Like Your Health Care Plan, You Can Keep It,’* POLITIFACT, (Dec. 12, 2013, 4:44 PM), <http://www.politifact.com/truth-o-meter/article/2013/dec/12/lie-year-if-you-like-your-health-care-plan-keep-it/>.

431. BLACKMAN, UNRAVELED, *supra* note 222, at 219–23; Office of Mgmt. & Budget, Exec. Office of the President, *Statement of Administration Policy* (Nov. 14, 2013), <https://www.scribd.com/doc/311782857/Statement-of-Administration-Policy-Nov-14-2013>.

heard from me that if they had a plan that they liked, they could keep it.”<sup>432</sup> In response, the President “offer[ed] an idea that will help.”<sup>433</sup>

The Affordable Care Act allows states to enforce the law’s insurance mandates, including the strict grandfathering rules.<sup>434</sup> If a state declines to enforce the mandates, however—it cannot be commandeered to act<sup>435</sup>—the Secretary of HHS is obligated to do so. The statute provides: “[i]n the case of a determination by the Secretary that a State has failed to substantially enforce” the mandates, “the Secretary *shall* enforce such provision.”<sup>436</sup> This is a quintessential example of cooperative federalism. States are permitted to enforce a federal regime, but if they fail to do so—or do so inadequately—the federal government is obligated to take over. The administrative fix sticks a wrench into this cooperative framework.

Under the new policy, HHS would permit, but not require “insurers [to] extend current plans that would otherwise be canceled into 2014.”<sup>437</sup> If an insurer elected to do so, customers could “choose to re-enroll in the same kind of [noncompliant] plan.”<sup>438</sup> State insurance commissioners, and ultimately individual insurance companies, would decide whether such plans could be sold that did not meet the ACA’s requirements.<sup>439</sup> If the insurer sold a noncompliant plan, HHS would simply look the other way and not enforce the mandates or penalties.<sup>440</sup> The administrative fix flatly ignores Obamacare’s mandates and publicly announces that the Secretary will not enforce the ACA’s requirements if states decline to do so.

c. *West Virginia v. Burwell*

In January 2014, West Virginia challenged the legality of the administrative fix.<sup>441</sup> The Mountain State argued that “there is simply no plausible legal defense for the Administrative Fix.”<sup>442</sup> In its brief, the Justice Department stated that the ACA “does not specify any circumstances under which such a determination” that a state is not enforcing the mandates “must be made.”<sup>443</sup> In other words, notwithstanding the command that the “Secretary *shall* enforce” the mandate if states do not, HHS argued that the law does not require HHS to *ever* make

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432. President Barack Obama, *Statement by the President on the Affordable Care Act*, WHITE HOUSE (Nov. 14, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/11/14/statement-president-affordable-care-act> [https://perma.cc/44XS-B3AU] [hereinafter Obama, Statement].

433. *Id.*

434. 42 U.S.C. § 300gg-22(a)(1) (2012).

435. *New York v. United States*, 505 U.S. 144, 180 (1990).

436. 42 U.S.C. § 300gg-22(a)(2) (2012).

437. Obama, Statement, *supra* note 432.

438. *Id.*

439. *Id.*

440. Letter from Gary Cohen, Director, Center for Consumer Information & Ins. Oversight, Department of Health and Human Services, to State Insurance Commissioners (Nov. 14, 2013).

441. In the interest of full disclosure, I reviewed an early draft of West Virginia’s complaint.

442. Opening Brief of Appellant State of West Virginia at 11, *West Virginia v. United States Department of Health and Human Services*, 145 F.Supp. 3d 94 (D.D.C. 2015) (No. 15-5309), 2016 WL 194150.

443. Defendant’s Memorandum in Support of Motion to Dismiss at 14, *West Virginia*, 145 F. Supp. 3d 94 (No. 1:14-cv-1287).

the threshold determination of a state's nonenforcement. Therefore, if the Secretary never makes this determination, it is entirely within the law for the mandates to go unenforced. The statute becomes a nullity at the Secretary's discretion. This defense strains credulity.

The circumstances that gave rise to the administrative fix further undercut the validity of this defense. For over three years after the enactment of the ACA, the Obama Administration issued a series of regulations making it tougher to grandfather old plans. Everyone involved in the process—the federal government, state insurance commissioners, and insurance companies—understood that the Secretary of HHS would ensure that the mandates were *vigorously* enforced. That is why insurance companies mailed millions of cancellation notices—because they knew the old plans were no longer valid. Only *after* the cancellation of the policies proved unpopular, and the President's promise proved untrue, did the government abandon its own position about the mandate.

As Justice Brandeis observed nine decades earlier, “[t]he President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.”<sup>444</sup> This is not a case where the administration lacks the “means and instruments,” or time and resources, to enforce the law against all insurers that offer noncompliant plans. The administration prospectively announced and sanctioned insurers doing that which the ACA, and its own promulgated regulations, prohibits.

The combination of reversal and nonenforcement should eliminate any presumption of deference, and indeed put the courts on heightened alert that the executive branch is engaging in unlawful conduct. Only after the administration's own policies proved unpopular did the executive branch suddenly realize it had this boundless font of prosecutorial discretion all along.<sup>445</sup> The President directed a suspension of the mandates, and his administration conjured up a fix that could not be supported by the text or history of the ACA. This is precisely the situation where *Heckler v. Chaney*'s<sup>446</sup> prudential presumption against reviewability should be flipped. It is harder to imagine a more clear-cut case where an administration “consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>447</sup>

d. “You can't just shake your head and say no”

Once again, the government's only meaningful defense was standing. As in *Johnson v. OPM*, the district court dismissed West Virginia's case due to a lack of standing.<sup>448</sup> During arguments before the D.C. Circuit Court of Appeals,

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444. *Myers v. United States*, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting).

445. *Crowley Caribbean Transport, Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) (“[A]n agency's pronouncement of a broad policy against enforcement poses special risks that ‘has consciously and expressly adopted a general policy that is so extreme as to amount to an abdication of its statutory responsibilities.’”) (quoting *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985)).

446. 470 U.S. 821 (1985).

447. *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

448. *West Virginia v. Dep't of Health & Human Serv.*, 145 F. Supp. 3d 94, 111 (D.D.C. 2015).

Judge Laurence H. Silberman wondered aloud whether the government took the action it did knowing that no court could stop it. He asked the attorney from the Justice Department’s civil division, “[w]hen the government took the action it took, did it think that no one would have standing to challenge it?”<sup>449</sup> The attorney responded, “[t]o my knowledge, that inquiry was not undertaken, your honor.”<sup>450</sup> Indeed, such a decision would not be discussed with a rank-and-file advocate. Under the auspices of presidential administration, the sort of conversation Judge Silberman—a stalwart of executive branch service—hypothesized would only occur at the highest levels of the executive branch—shielded by deliberative privilege.

Returning to *House of Representatives v. Burwell*, we do have some anecdotal evidence of how this process could have played out. According to the White House Visitor Logs, on November 27, 2013, OMB General Counsel Geovette Washington attended a meeting to discuss the CSR payments at the White House with her counterparts at Treasury and HHS, as well as Solicitor General Donald Verrilli and Associate Attorney General Stuart Delery.<sup>451</sup> During her deposition, Ms. Washington acknowledged that she shared the memorandum with the general counsels of Treasury and HHS, but citing “executive branch confidentiality interests,” she refused to answer which White House personnel participated in the meeting.<sup>452</sup> (Their names would not show up on the visitor’s log.) By this point, the executive branch had already chosen its course of action. Nothing the Solicitor General could have said would have reversed the policy because the budget request had been withdrawn months earlier.

This meeting’s ostensible goal was to discuss how to defend the payments in court. The presence of the Solicitor General suggests that the administration was no doubt countenancing a legal challenge all the way to the Supreme Court. While it is impossible to know what transpired at the November 27, 2013 meeting, there is little doubt that the Solicitor General advised the administration that no party would have standing to challenge the CSR program, and thus the decision was insulated from judicial review. A similar conversation likely preceded the OPM fix and the administrative fix.

During oral arguments in *House of Representatives v. Burwell*, Judge Rosemary M. Collyer expressed her frustration that the government was unwilling to defend the CSR payments. She chided the Justice Department lawyer, “[y]ou can’t just shake your head and say ‘no, no, I don’t have to answer that question.’”<sup>453</sup> When he bobbed and weaved, Judge Collyer charged: “This is the problem I have with your brief: It’s not direct. It’s just not direct. You have to address the argument that [the House] makes and you haven’t.”<sup>454</sup> Once the court

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449. BLACKMAN, UNRAVELED, *supra* note 222, at 365–66.

450. *Id.* at 366.

451. BLACKMAN, OVERSIGHT, *supra* note 324, at 61. Also attending the meeting were Deputy General Counsel of HHS Ken Choe, Treasury Principal Deputy General Counsel Christopher Meade, Treasury Deputy General Counsel Chris Meade, and HHS General Counsel William Schultz. *Id.*

452. *Id.* at 55, 57, 60–61.

453. BLACKMAN, UNRAVELED, *supra* note 222, at 364.

454. *Id.*

found that the House had standing, the Obama Administration was required to defend its spending—and it did not go well. In May 2016, Judge Collyer issued her second decision in the case, ruling that the executive branch had illegally spent billions of dollars under Section 1402, in violation of the Constitution’s Appropriations Clause.<sup>455</sup>

The difference between *West Virginia* and *House of Representatives* is that in the latter case, the court could address an egregious exercise of presidential maladministration. *West Virginia*, however, was out of luck because non-enforcement of the mandate gave rise to no injury under current case law.<sup>456</sup> Despite this flagrant disregard of the statute, the administrative fix continued unabated, as the administration extended this suspension through the end of 2016.<sup>457</sup>

## 2. *Executive Actions on Immigration*

In June 2012, the Obama Administration announced the first major executive action on immigration known as Deferred Action for Childhood Arrivals (“DACA”).<sup>458</sup> In November 2014, the President revealed a “similar” expanded executive action known as Deferred Action for Parents of American and Lawful Permanent Residents (“DAPA”).<sup>459</sup> Both policies, as their names suggest, employed the administrative practice of “deferred action” to halt the deportations of certain aliens who lacked lawful presence. DACA has deferred the deportations of, and granted work authorization to, approximately one million “Dreamers”—certain aliens who entered the country as minors and graduated from high school.<sup>460</sup> DAPA would have deferred the deportations of roughly four million alien parents of certain minor children who are U.S. citizens or lawful permanent residents.<sup>461</sup> A full discussion of whether DACA and DAPA are consistent with the Immigration and Nationality Act,<sup>462</sup> principles of administrative law,<sup>463</sup> or the President’s duty to faithfully execute the laws,<sup>464</sup> is far beyond the scope of

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455. U.S. House of Reprs. v. Burwell, 185 F.Supp. 3d 165, 168 (D.D.C. 2016).

456. *West Virginia v. Dep’t of Health and Human Serv.*, 827 F.3d 81, 82 (D.C. Cir. 2016) (dismissing case for lack of standing); *West Virginia v. Dep’t of Health & Human Serv.*, 827 F.3d 81, 84 (D.C. Cir. 2016), *cert. filed*, (No.16-271), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/16-721.htm>.

457. See Robert Pear, *Consumers Allowed to Keep Health Plans for Two More Years*, N.Y. TIMES (Mar. 5, 2014), <https://www.nytimes.com/2014/03/06/us/politics/obama-extends-renewal-period-for-noncompliant-insurance-policies.html>.

458. President Barack Obama, *Remarks by the President on Immigration*, WHITE HOUSE (June 15, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration>.

459. President Barack Obama, *Remarks by the President in Address to the Nation on Immigration*, WHITE HOUSE (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.

460. Blackman, *The Constitutionality of DAPA Part II*, *supra* note 308, at 215.

461. *Id.*

462. See Blackman, *The Constitutionality of DAPA Part I*, *supra* note 421.

463. Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241 (2016) [hereinafter *Gridlock*].

464. See Blackman, *The Constitutionality of DAPA Part II*, *supra* note 308.

this Article.<sup>465</sup> Rather, we will focus on the role that presidential maladministration played in the creation of these executive actions and how that influence affects judicial review.

DACA and DAPA, the perfect storms of presidential maladministration, are mirror images of each other. First, the President twice reversed *his own* longstanding interpretations of prosecutorial discretion. Second, in the wake of two separate immigration defeats in the gridlocked Congress, the President suddenly discovered and “unearthed [the] holy grail of prosecutorial discretion.”<sup>466</sup>

Third, the effect of both nonenforcements was to exempt millions of aliens from removal. Fourth, in addition to halting the removal of aliens, the President conferred “lawful presence” on those aliens, providing them with work authorization. Fifth, the actions were funded by application fees, so they could not be defunded by Congress. Finally, the availability of judicial review was unclear because the action did not inflict any obvious injuries. These actions, more than any other, illustrate the threat presidential maladministration poses to the separation of powers.

a. The Five Ds

DACA and DAPA were both birthed by the same progression I refer to as the *five Ds*: deliberation, disclaimer, defeat, debate, and discovery.

i. Deliberation

Immigration reform has long been a divisive and contentious political football in Congress. For our purposes, two bills are particularly salient. First, the DREAM Act would have provided a form of permanent residency and work permits for certain aliens who entered the country as minors and graduated from high school.<sup>467</sup> Second, the “Border Security, Economic Opportunity, and Immigration Modernization Act,” commonly known as *comprehensive immigration reform*, would have provided a pathway to citizenship for nearly 11 million aliens who lack lawful presence.<sup>468</sup> These were both high-profile pieces of legislation that members of Congress carefully considered and deliberated over, both in terms of policy and how the legislation would affect their re-election prospects. Ultimately, neither the DREAM Act nor the comprehensive immigration reform achieved bicameralism.<sup>469</sup>

ii. Disclaimer

During the contentious deliberations over the DREAM Act in 2012 and comprehensive immigration reform in 2014, the prospects of their passage looked increasingly bleak. Throughout this time, immigration advocates called

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465. *See id.*

466. *Gridlock*, *supra* note 463, at 293.

467. *See generally* DREAM Act of 2010, S. 3992, 111th Cong. (2010).

468. S. 744, 113th Cong. (2013).

469. Blackman, *The Constitutionality of DAPA Part II*, *supra* note 308, at 268.

on President Obama to take executive action to provide relief to aliens who were unlawfully present in the United States. At a series of town hall forums, President Obama consistently maintained that his hands were tied, and that only Congress could alter the status quo.<sup>470</sup>

Specifically, on several occasions, he clearly disclaimed the power to implement DACA and DAPA. In 2012, Gabriel Lerner from *AOL Latino* asked the President about “granting administrative relief for Dreamers.”<sup>471</sup> (The “Dreamers” were the intended beneficiaries of DACA.) Mr. Obama replied that those who advocate an administrative solution have done a “great disservice . . . by perpetuating the notion that somehow, by myself, I can go and do these things. It’s just not true.”<sup>472</sup> In 2014, during an appearance on *Univision*, the host asked President Obama whether he could grant administrative relief to a mother who was “undocumented, however, her sons are citizens.”<sup>473</sup> (This mother was the intended beneficiary of DAPA.) The President replied, “what I’ve said in the past remains true, which is until Congress passes a new law, then I am constrained in terms of what I am able to do.”<sup>474</sup> DACA, he admitted, “already stretched my administrative capacity very far.”<sup>475</sup> The President could go no further because “at a certain point the reason that these deportations are taking place is, Congress said, you have to enforce these laws.”<sup>476</sup> Citing congressional power to distribute funding, the President reiterated, “I cannot ignore those laws any more than I could ignore, you know, any of the other laws that are on the books.”<sup>477</sup>

In both cases, President Obama personally disclaimed the authority to take the exact executive actions he ultimately took. Further, as I have noted elsewhere, the fact that these “comments of the only person elected to the highest office in the land were unscripted—and not prepared by an army of speechwriters—elevates this discourse.”<sup>478</sup>

### iii. Defeat

The DREAM Act passed the Democratic-controlled House, but the bill was filibustered in the Senate on December 18, 2010.<sup>479</sup> It is usually forgotten that the vote occurred in the lame duck session after the midterm election where Democrats lost their sixty-seat majority in the House. Also lost to the sands of

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470. *Id.* at 270–73.

471. President Barack Obama, Remarks in an “Open for Questions” Roundtable (Sept. 28, 2011) (transcript available at <https://perma.cc/X5AL-DUWX>).

472. *Id.*

473. Interview by Univision with Barack Obama, President of the United States (Mar. 5, 2014) (transcript available at <http://communications-univisionnews.tumblr.com/post/79266471431/univision-news-transcript-interview-with>).

474. *Id.*

475. *Id.*

476. *Id.*

477. *Id.*

478. *Gridlock*, *supra* note 463, at 292.

479. Scott Wong & Shira Toeplitz, *DREAM Act Dies in Senate*, POLITICO (Dec. 20, 2010, 8:07 AM), <http://www.politico.com/story/2010/12/dream-act-dies-in-senate-046573> [<https://perma.cc/9R4T-PPY7>].



time is the fact that six Democrats did not vote for cloture.<sup>480</sup> Later that day, the White House released a statement: “Moving forward, my administration will continue to do everything we can to fix our nation’s broken immigration system so that we can provide lasting and dedicated resources for our border security while at the same time restoring responsibility and accountability to the system at every level.”<sup>481</sup>

Fast forward to June 30, 2014, when the House Republican leadership announced it would not bring up for a vote the comprehensive immigration reform bill that passed the Senate the year before.<sup>482</sup> Hours after this decision, the President appeared in the Rose Garden with far more unequivocal statements: “I take executive action only when we have a serious problem, a serious issue, and Congress chooses to do nothing . . . [I will] fix as much of our immigration system as I can on my own, without Congress.”<sup>483</sup> As discussed earlier, the President’s announcement of an administration from the Rose Garden is a quintessential and unequivocal exercise of administration. There is no doubt the regulatory change that followed came from the top. A corollary to this principle is that the executive action being taken is not routine, but almost certainly represents a new direction worthy of the President’s personal attention. In this case, after Congress withheld certain authority, the President took to the Rose Garden to announce that he had a similar power all along.

This exchange illustrates the exploitative relationship between gridlock and executive power.<sup>484</sup> In her article, Professor Kagan attributed President Clinton’s focus on administration to the “re-emergence of divided government.”<sup>485</sup> She was not surprised that the White House would choose this approach because it creates for the President “a sphere in which he unilaterally can take decisive action,” particularly where he cannot meet public demands “through legislation.”<sup>486</sup> Kagan recalled that aides in the White House considered “their administrative strategy . . . as a reaction to the set of incentives created by the [divided] political environment.”<sup>487</sup> Writing somewhat prophetically, Kagan observed that “the possibility of significant legislative accomplishment . . . has grown dim in an era of divided government with high polarization between congressional parties.”<sup>488</sup> This is precisely what happened with respect to President Obama’s legislative push on immigration.

In a profile on President Obama’s transformation of the Republic, the *New York Times* observed that “as Republicans increased their control of Capitol Hill,

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480. “On the Cloture Motion H.R. 5325”, <https://perma.cc/4XE6-5HJG>, Accessed: Oct. 23, 2016.

481. President Barack Obama, *Statement by the President on the Senate Vote on the DREAM Act*, WHITE HOUSE (Dec. 18, 2010) <https://perma.cc/6MKK-YRRK>.

482. *Transcript: President Obama’s June 30 Remarks on Immigration*, WASH. POST (June 30, 2014), <https://perma.cc/H49J-8N2L>.

483. *Id.*

484. *See Gridlock*, *supra* note 463.

485. Kagan, *supra* note 1, at 2250.

486. *Id.* at 2312.

487. *Id.* at 2313.

488. *Id.* at 2311.

Mr. Obama's deep frustration with congressional opposition led to a new approach: He gradually embraced a president's power to act unilaterally.<sup>489</sup> Cecilia Muñoz, director of Domestic Policy Council, explained that the administration "learned by about the third year that the answer to every challenge isn't going to be legislative."<sup>490</sup> Coincidentally, in the third year, the Democrats lost the majority in the House of Representatives and a filibuster-proof majority in the Senate.<sup>491</sup> Looking forward, the *Times* quoted from *Presidential Administration* and observed that "[t]o sidestep Congress," Hillary Clinton or Donald Trump would "now have the legacy of Mr. Obama."<sup>492</sup>

At bottom, Kagan acknowledged the risks posed by presidential administration, but she was more concerned about a "crisis in governability," and was willing to tolerate those costs to ensure "a well-functioning political system."<sup>493</sup> She favorably quoted Alexander Hamilton, who compared the United States under the Articles of Confederation to the declining Roman Republic: "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government."<sup>494</sup>

#### iv. Debate

In the periods after the defeat of the DREAM Act and comprehensive immigration reform, the Obama Administration engaged in internal debates about the scope of the President's own power. Unlike with the House of Representatives challenge to the CSR payments—where a detailed congressional oversight report provides sworn affidavits from government officials—for DACA and DAPA, we are left to rely on un-sourced press accounts. Though not ideal, these insights offer some glimmers of light into the bureaucratic black box. To provide some background of the Obama Administration's internal deliberations, we will begin our analysis with a slight detour to another controversial executive action.

##### (a) Libya

On March 19, 2011, the United States began a military engagement in Libya, supporting rebels who were attempting to overthrow Muammar Gadhafi.<sup>495</sup> Under the provisions of the War Powers Resolution ("WPR"), the President can engage in "hostilities" for sixty days without congressional approval.<sup>496</sup> If Congress does not provide approval, the President must cease all

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489. Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), [https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?partner=rss&emc=rss&\\_r=0](https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html?partner=rss&emc=rss&_r=0) [http://nyti.ms/2eHyqmS].

490. *Id.*

491. *Id.*

492. *Id.*

493. Kagan, *supra* note 1, at 2343.

494. *Id.* (citing THE FEDERALIST NO. 70) (Alexander Hamilton)).

495. CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 637 (2015).

496. War Powers Resolution, 50 U.S.C. § 1544(b) (2012).

“hostilities” by the ninetieth day.<sup>497</sup> As May 20, 2011 drew near, according to Charlie Savage’s inside account in *Power Wars*, it became clear to the White House “that there was no political appetite to enact an authorization.”<sup>498</sup> On May 17, the Obama Administration “lawyers scrambled to answer the question of what, if anything, had to change on day sixty.”<sup>499</sup> Jeh C. Johnson, who served as the Defense Department’s general counsel (and would later become Secretary of Homeland Security) recommended that the United States scale back its activity so the military was only providing a “supporting role” in the NATO-led conflict.<sup>500</sup> This interpretation of the WPR meant that there would be “no more American missile strikes at air defenses” or Predator drone strikes, which had become a common staple of the military’s activity.<sup>501</sup> Caroline D. Krass, who served as the acting head of the Office of Legal Counsel, “agreed with [the] . . . substance” of Johnson’s “discussion paper,” with “some minor tweaks.”<sup>502</sup> According to Savage, OLC had “never interpreted the War Powers Resolution” to support continued operations, “given the number of American bombs that were still falling.”<sup>503</sup>

As the President considered his options, Robert F. Bauer, the White House Counsel, “told him that there was another interpretation of the War Powers Resolution.”<sup>504</sup> This theory was proposed by Harold Hongju Koh, who took leave as Yale Law School Dean to serve as the Legal Adviser to the State Department.<sup>505</sup> The term “hostilities” was not defined in the WPR, nor had the Supreme Court ever interpreted it.<sup>506</sup> Therefore, Koh argued, the statute was open to interpretation. Because of the limited nature of the military engagement in Libya, the legal adviser told the President that the United States’ involvement did not rise to the level of “hostilities.”<sup>507</sup> Under this interpretation, because the military was not engaging in “hostilities,” the WPR did not apply, and it could continue its mission beyond the sixty-day threshold. Bauer “warned that this approach was not the *favored* interpretation of the law among others on the administration legal team and predicted that Obama would be criticized for embracing it. But, he maintained, it was *legally available*.”<sup>508</sup> Tom Donilon, who served as the National Security Advisor, told Charlie Savage that this argument “was not an after-the-fact rationalization,” but “was on the table before the decision.”<sup>509</sup>

Attorney General Eric Holder met with the President, indicating that he supported Krass’ position, but “Obama had already made the decision by

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497. *Id.* § 1541.

498. SAVAGE, *supra* note 495, at 641.

499. *Id.* at 643.

500. *Id.*

501. *Id.*

502. *Id.*

503. *Id.* at 641.

504. *Id.* at 644.

505. *Id.* at 645.

506. *Id.* at 647.

507. *Id.* at 644.

508. *Id.* at 644–45.

509. *Id.* at 645.

then.”<sup>510</sup> Holder acquiesced, and “indicated that the Bauer-Koh theory was not the best interpretation in the eyes of the department, but that was not the same thing as pronouncing the theory legally unavailable and out-of-bounds.”<sup>511</sup> Soon the other administration lawyers learned that “the military would keep going without changes after May 20.”<sup>512</sup> Johnson, the DOD General Counsel, told Bauer that he would not endorse the “non-hostilities” theory, and “was sticking with what he said in his discussion paper.”<sup>513</sup>

The President did not request an official opinion from the OLC. In 2015, Krass, who served as OLC head, lamented that frequent Freedom of Information Act (“FOIA”) requests have “served as a deterrent to some in terms of coming to the office to ask for a formal opinion.”<sup>514</sup> She added, “anytime the administration adopts a position in the context of domestic law or national security that could be [or] seems a little bit edgy or slightly controversial, immediately the request for the OLC opinion comes.”<sup>515</sup>

But OLC’s refusal to provide an opinion was not due to fears of a FOIA request. Krass told Bauer that if her office was asked to “write a formal, authoritative memo analyzing the question, she was unlikely to give the White House the answer it wanted to hear.”<sup>516</sup> As a result, no memo was requested. Instead that task fell to Bauer and Koh. In the weeks following May 20, the duo “developed their initially bare-bones ‘non-hostilities’ theory into a four-factor test,”<sup>517</sup> which the State Department’s legal adviser presented in testimony to Congress on June 28, 2011.<sup>518</sup>

A White House spokesperson, Eric Schultz, later said there was “a full airing of views within the administration and a robust process.”<sup>519</sup> He added, “[i]t should come as no surprise that there would be some disagreements, even within an administration, regarding the application of a statute that is nearly 40 years old to a unique and evolving conflict,” Mr. Schultz said.<sup>520</sup> “Those disagreements are ordinary and healthy.”<sup>521</sup>

Obama’s choice to adopt the “non-hostilities” theory of war powers is the quintessential example of presidential administration: The commander-in-chief personally overruled the Justice and Defense Departments, adopting an interpre-

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510. *Id.* at 646.

511. *Id.*

512. *Id.* at 644.

513. *Id.* at 645–46.

514. Josh Gerstein, *Official: FOIA Worries Dampen Requests for Formal Legal Opinions*, POLITICO (Nov. 5, 2015, 3:59 PM), <http://www.politico.com/blogs/under-the-radar/2015/11/official-foia-worries-dampen-requests-for-formal-legal-opinions-215567#ixzz4J12uVZSu> [<https://perma.cc/65R7-HTUV>].

515. *Id.*

516. SAVAGE, *supra* note 495, at 646.

517. *Id.* at 645.

518. Harold Hongju Koh, *Testimony Before the Senate Foreign Relations Committee*, U.S. DEP’T OF STATE (June 28, 2011), <https://perma.cc/NW5E-LHFQ>.

519. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html?mcubz=1>.

520. *Id.*

521. *Id.*

tation of his authority that allowed him to accomplish his foreign policy objectives. This was not the only time the President overruled OLC. Around the same time period, the Attorney General was not even told about the planned raid on Osama bin Laden's compound in Pakistan.<sup>522</sup> During a meeting on April 28, 2011, one week before the raid, the director of the National Counterterrorism Center told his legal adviser, "I think the A.G. should be here, just to make sure."<sup>523</sup> Thomas E. Donilon, the national security adviser, said "there was no need for the attorney general," let alone the Office of Legal Counsel, "to know."<sup>524</sup>

During an interview on the *Colbert Report* in December 2014, the President explained that there are limits on his own power: "What I've tried to do is to make sure that the Office of Legal Counsel, which weighs in on what we can and cannot do, is fiercely independent. They make decisions. We work well within the lines of that."<sup>525</sup> In light of the Libya episode, this cautionary note is utterly implausible. When OLC said no, the President looked elsewhere. Later, Obama dismissed the Libya War Powers legal controversy. "A lot of this fuss is politics," he said.<sup>526</sup> "We have engaged in a limited operation to help a lot of people against one of the worst tyrants in the world . . . and this suddenly becomes the cause célèbre for some folks in Congress? Come on."<sup>527</sup>

The decision to exclude the Justice Department from the process was widely criticized and a sharp departure from past practice. In 2004, then-White House Counsel Alberto R. Gonzales wanted Attorney General John D. Ashcroft to overrule an OLC opinion which rejected the government's warrantless wiretapping program.<sup>528</sup> Gonzales visited Ashcroft in the hospital, where the attorney general was recovering from surgery.<sup>529</sup> Ashcroft refused to approve the override.<sup>530</sup> Nonetheless, President Bush reauthorized the program under his own authority.<sup>531</sup> Senior law enforcement officials in DOJ, including FBI Director Robert Mueller and future FBI Director James Comey, threatened to resign if Bush continued to ignore OLC.<sup>532</sup> The President withdrew the policy.<sup>533</sup>

Professor Jack Goldsmith, who headed OLC during the Bush Administration said the decision not to tell the Attorney General about the bin Laden raid was "very hard to understand or justify," but the decision to shortcut OLC was

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522. SAVAGE, *supra* note 495, at 259–60.

523. *Id.* at 260.

524. Charlie Savage, *How 4 Federal Lawyers Paved the Way to Kill Osama Bin Laden*, N.Y. TIMES (Oct. 28, 2015), <http://nyti.ms/2e1pvg9>.

525. Interview by Stephen Colbert with President Barack Obama, in Wash., D.C. (Dec. 8, 2014), <https://perma.cc/2RSR-849Q>.

526. SAVAGE, *supra* note 495, at 649.

527. *Id.*

528. *Id.* at 190.

529. *Id.*

530. *Id.*

531. *Id.* at 190–91.

532. *Id.*

533. *Id.* at 191.

“only a little less surprising.”<sup>534</sup> Goldsmith pointed out that “early in the administration, [Attorney General Holder] reportedly overruled an OLC opinion on the unconstitutionality of a D.C. voting rights bill after the Acting Solicitor General advised him he could defend the law in court.”<sup>535</sup>

In that episode from April 2009, OLC concluded that a bill to give the District of Columbia a vote in the House was unconstitutional, agreeing with a decision reached by the Bush Administration two years earlier.<sup>536</sup> According to the *Washington Post*, “Holder rejected the advice and sought the opinion” of Acting Solicitor General Neal Katyal, who explained that his office could “defend the legislation if it were challenged after its enactment.”<sup>537</sup> Note a similar conversation likely transpired in the White House when Solicitor General Verilli met with administration officials to discuss the Obamacare CSR payments. The question was not whether the policy was constitutional, but if the Solicitor General could muster together a defense. Holder’s spokesperson said he “weighed the advice of different people inside the department, as well as the opinions of legal scholars, and made his own determination that the D.C. voting rights bill is constitutional” based on his “best independent legal judgment.”<sup>538</sup>

Professor Eric Posner, who served as an attorney adviser in OLC, queried derisively why “[n]ot just the OLC, but the entire Justice Department was frozen out. Why? Could it be that the OLC was less than cooperative when the White House sought a legal rubber stamp for the Libya intervention in 2011? Has the OLC been demoted for its insubordination?”<sup>539</sup> Karl Thompson, who headed OLC when the DAPA memorandum was released, recalled that “[t]he vast majority of our advice is provided informally,” and “is delivered orally or in emails.”<sup>540</sup> Thompson added that even informal advice is “the official view of the office,” and “people are supposed to and do follow it.”<sup>541</sup> The focus on “supposed to” was more aspirational than practical.

On June 17, 2011—two weeks before he would present his “non-hostilities” theory to Congress—Koh addressed the progressive American Constitution Society. (By chance, I was in attendance.) The speech addressed the role that government lawyers play within the administration. He explained that “I advo-

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534. Jack Goldsmith, *The Decline of OLC*, LAWFARE (Oct. 28, 2015, 6:11 PM), <https://perma.cc/9CXA-BMQE>.

535. *Id.* (citing Carrie Johnson, *Some in Justice Department See D.C. Vote in House as Unconstitutional*, WASH. POST (Apr. 1, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/31/AR2009033104426.html>).

536. *Constitutionality of the D.C. Voting Rights Act of 2007: Testimony Before the Subcomm. on the Constitution, Civil Rights, and Property Rights of the Senate Comm. on the Judiciary*, 110th Cong. (2007) (statement of John P. Elwood, Deputy Assistant Attorney General), <https://www.justice.gov/file/451551/download>.

537. Johnson, *supra* note 535.

538. *Id.*

539. Eric Posner, *The Bin Laden Raid: Where Was The OLC?*, ERICPOSNER.COM (Oct. 28, 2015), <https://perma.cc/2TV8-4MHF>.

540. Gerstein, *supra* note 514.

541. *Id.*

cate inside the government fiercely for my preferred position, [and] when a position is taken, I defend it honestly.”<sup>542</sup> Koh, echoing Savage’s unsourced comments, insisted that “I defend my client’s,” that is, the President’s, “right to choose *legally available* options.”<sup>543</sup> Koh quoted Herman Pflieger, former legal adviser at the State Department, who said “[y]ou should never say ‘no’ to your client when the law and your conscience say ‘yes’; but you should never, ever say ‘yes’ when your law and conscience say ‘no.’”<sup>544</sup> Koh stressed, “[i]f you hear me say something, you can be absolutely sure that I believe it,” including his opinion on “the administration’s position on war powers in Libya.”<sup>545</sup>

Speaking from personal experience, Koh relayed that “[i]n the government when a number of options are on the table, you should remove the illegal options,” and “not try to figure out a way to pretend that it is.”<sup>546</sup> He paused. “But there is a flipside to this. Your client has a right to choose from the other options, even those you think are lawful, if awful. And if that is the choice they make, you have to give it your vigorous defense.”<sup>547</sup> Ultimately, under the auspices of administration, that is the President’s choice, however awful it is.

In the realm of foreign affairs, judicial scrutiny is a *non sequitur* because parties will seldom, if ever, have standing. But putting aside justiciability for argument’s sake, deference for this sort of maladministration—where the President disregards OLC to adopt awful arguments that do not pass “even the laugh test”<sup>548</sup>—stands on firmer grounds because of the President’s Article II powers and responsibilities as commander-in-chief.<sup>549</sup> With respect to domestic affairs, such as with immigration—where Congress’s authority is paramount and plenary, however, the presumption of deference for presidential maladministration is simply unjustified.

### (b) DACA

As late as March 2011—the same period when the administration developed legal justifications for the Bin Laden raid and the Libya “non-hostilities”—the President still disclaimed that he could offer administrative relief from deportation for the Dreamers. During a town hall meeting broadcasted on Univision, he told anchor Jorge Ramos, “with respect to the notion that I can just suspend deportations through executive order, that’s just not the case, because there are laws on the books that Congress has passed.”<sup>550</sup>

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542. American Constitution Society, *State Department Legal Adviser Harold Koh Addresses the 10<sup>th</sup> Anniversary ACS National Convention*, YOUTUBE (Nov. 21, 2013), [https://www.youtube.com/watch?v=7NewsfU\\_nl](https://www.youtube.com/watch?v=7NewsfU_nl) (starting at 22:45).

543. *Id.* (starting at 24:14).

544. *Id.* (starting at 24:17).

545. *Id.* (starting at 35:20).

546. *Id.* (starting at 24:30).

547. *Id.* (starting at 25:00).

548. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2239 (2015) (Kagan, J., concurring).

549. *Gridlock*, *supra* note 463, at 285.

550. President Barack Obama, Remarks by the President at Univision Town Hall (Mar. 28, 2011) (emphasis added), <https://obamawhitehouse.archives.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

Presumably, at this time, the President was being advised that he could not defer the deportations of the Dreamers through executive action. I pause here to address a likely rebuttal: the President's remarks were mere posturing. While he was trying to garner support for immigration reform, an admission that he could bypass Congress through executive actions would have further poisoned the political well and hindered legislative action. This rebuttal presumes that the President was content to lie and mislead the American people about the contours of his own executive power in violation of his solemn oath to support and defend the Constitution. If you accept this premise, then we can just as easily conclude that the Obama Administration's later defense of DACA was also a sham—a mere pretext to accomplish a certain political goal. If we go down this rabbit hole, the entire bedrock premise of deference—that the executive branch is attempting in good faith to interpret its own authority—crumbles completely. If the executive branch is flat-out lying about its own executive power, and how to interpret immigration laws, we have problems far greater than the *Chevron* two-step. The entire doctrine should be jettisoned.

I am not so cynical. Truly. The far more plausible scenario is that in March 2011, the President's lawyers had indeed advised him that he could not take such action, and he repeated that advice during the various town hall meetings. But at some point afterwards, the executive branch "upon further reflection" received a second opinion. Or maybe a third opinion.

Unlike with the Libya episode, OLC blessed DACA, albeit informally. How do we know? In its 2014 published opinion explaining the legality of DAPA, OLC provides the slightest glimpse inside the bureaucratic black box.<sup>551</sup> Through a cryptic footnote, OLC hinted at the otherwise unknowable process behind DACA:

Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis.<sup>552</sup>

Reading between the lines—with an appropriate Kremlinology-style lens—a few facts jump out. First, there was a reversal. The President was previously advised that he could not halt the deportations of the Dreamers, but then OLC told him he could exercise his discretion in that fashion. This is not a case where the Obama Justice Department reversed a position of the Bush Administration "upon further reflection." Rather, it was the same Janus-faced executive branch that reversed itself. Second, OLC only "orally advised" the government, rather than writing a formal opinion. As discussed earlier, fears of FOIA request

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551. Blackman, *The Constitutionality of DAPA Part I*, *supra* note 421, at 96.

552. Office of Legal Counsel, Memorandum Opinion on The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others (Nov. 19, 2014) at 18 n.8, <https://www.scribd.com/document/247401618/OLC-Memo-on-immigration> [hereinafter OLC Opinion]. I have demonstrated elsewhere that the review process for DACA did not allow "immigration officials [to] retain[] discretion to evaluate each application on an individualized basis," but rather was more akin to a rubber stamp. Blackman, *The Constitutionality of DAPA Part II*, *supra* note 308, at 239.



deterred the office from drafting formal opinions. But unlike national security decisions, where OLC opinions may reference classified opinions, it is unclear what controversial information would exist in a DACA opinion. Indeed, the President ultimately released the OLC opinion justifying DAPA in 2014.<sup>553</sup> Publishing the opinion does have one shortfall—it allows the public, and litigants, to criticize the government’s weak position.<sup>554</sup> This concern, far more than FOIA, animated the oral request. One way or the other, the administration internally debated the position, reversed its prior decision, and discovered the power the President previously disclaimed.

### (c) DAPA

From 2012 through 2014, while Congress considered comprehensive immigration reform, the President consistently disclaimed the authority to defer deportations of more aliens. Recall that we previously discussed a town hall meeting in March 2014 where the President announced that he had already pushed the boundaries of his authority as far as he could with DACA. Only four months later, after the House of Representatives announced that it would not vote on the comprehensive immigration reform bill, the President changed his position. By November, he now found the authority that he previously announced he did not possess.

Once again, I will not be so cynical to presume the President was merely lying about his own constitutional authority to nudge legislative action. But we should not lose sight of the role that presidential maladministration—that is Obama’s personal influence—played in the executive branch’s decision-making process.

Throughout the summer of 2014, the President announced that “[i]n the face of that kind of dysfunction” in Congress, “what I can do is *scour our authorities* to try to make progress.”<sup>555</sup> Charlie Savage wrote in *Power Wars* that President Obama told immigration advocacy groups, “I’m going to go as far as [my White House counsel] says I can.”<sup>556</sup> But he was the one calling the shots, as the President “would move his own goal posts.”<sup>557</sup> The *New York Times* reported that the President urged his legal team to use its “legal authorities to the

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553. Blackman, *The Constitutionality of DAPA Part I*, *supra* note 421, at 96.

554. I was on the PBS News Hour hours before DAPA was formally announced, and I called on OLC to release a memorandum explaining the legality of the policy. Josh Blackman, *PBS News Hour—The Constitutionality of President Obama’s Executive Action*, YOUTUBE (Nov. 19, 2014), <https://www.youtube.com/watch?v=APNaNJMs6So&feature=youtu.be> (“Until very recently, the president said over and over and over again he doesn’t have the authority to do this. Now he says his position is legally unassailable. I would like to see the memorandums from the Department of Justice explaining, what is the legal basis for this? What does this mean? What are the implications of this? If he can do this, what else can he do? And we need to have this debate before the action happens, not afterwards.”).

555. Caitlin MacNeal, *Obama: When Congress Fails, I’ll ‘Scour’ Authorities To ‘Make Progress’*, TPM LIVEWIRE (Aug. 6, 2014, 6:53 PM) (emphasis added), <https://perma.cc/4M9J-Y6R9>.

556. SAVAGE, *supra* note 495, at 661.

557. Gridlock, *supra* note 463, at 293–94.

fullest extent.”<sup>558</sup> When they presented the President with a preliminary policy, it was a disappointment because it “did not go far enough.”<sup>559</sup> Scouring the bottom of the presidential barrel for more power, Obama urged them to try again.<sup>560</sup> And they did just that.

*Politico* reported that over the course of eight months, the White House reviewed “more than [sixty] iterations” of the executive action.<sup>561</sup> This is the quintessential embodiment of presidential maladministration: The President asked his cabinet to define the contours of his own executive authority; when he was not satisfied with their answer, the President told them to go further. Kagan recognized from her experiences that “[p]residents, more than agency officials acting independently, tend to push the envelope when interpreting statutes.”<sup>562</sup> She was right.

To his credit—unlike with the Libya episode—White House counsel Neil Eggleston engaged the Office of Legal Counsel on this decision.<sup>563</sup> And unlike the Libya episode, the White House did not overrule OLC. Specifically, the Obama Administration considered granting deferred action to the parents of the DACA beneficiaries.<sup>564</sup> According to Charlie Savage, however, the Office of Legal Counsel countered “that that would be a step too far.”<sup>565</sup> OLC chief Karl Thompson wrote that the immigration laws “did not make close relatives of noncitizens eligible to apply to stay in the United States, even if those noncitizens had been granted temporary relief from deportation.”<sup>566</sup> Drawing this line, Thompson contended, allowed the new policy to “dovetail with the structure of immigration law as Congress had enacted it.”<sup>567</sup>

Thompson’s decision to exclude the parents of Dreamers from the new executive action, Savage reported, “raised the question of whether the Obama Administration should record his legal analysis on that issue in an authoritative Office of Legal Counsel memo he was writing, or whether the memo should only address the steps the administration was going to actually take.”<sup>568</sup> Lucas Guttentag, who was on leave from Stanford Law School as Senior Counsel to U.S. Citizen and Immigration Services,<sup>569</sup> reportedly argued against memorializing

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558. Michael D. Shear & Julia Preston, *Obama Pushed ‘Fullest Extent’ of His Powers on Immigration Plan*, N.Y. TIMES (NOV. 28, 2014), <https://www.nytimes.com/2014/11/29/us/white-house-tested-limits-of-powers-before-action-on-immigration.html>.

559. *Id.*

560. *Id.*

561. Carrie Budoff Brown et al., *How Obama Got Here*, POLITICO (Nov. 20, 2014, 9:02 PM), <https://perma.cc/BU4H-HS55>.

562. Kagan, *supra* note 1, at 2349.

563. SAVAGE, *supra* note 495, at 661.

564. *Id.* at 662.

565. *Id.*

566. *Id.*

567. *Id.* As I explain elsewhere, this exact same reasoning applies to the parents of Lawful Permanent Residents—a group that was protected by DAPA—but would *never* be able to petition for an adjustment of status. See Blackman, *The Constitutionality of DAPA Part I*, *supra* note 421, at 109.

568. SAVAGE, *supra* note 495, at 662.

569. Terry Nagel, *Stanford Law School’s Lucas Guttentag to Advise Obama Administration*, STAN. L. SCH. (Sept. 8, 2014), <https://perma.cc/89TW-3HDJ>.

this memo, “saying it would preclude the executive branch from having the option of choosing to help [the parents of DACA beneficiaries] in the future.”<sup>570</sup> Guttentag and others, “believed that [OLC] had drawn the line too narrowly by focusing unduly on whether someone had a child who is an American citizen, to the exclusion of other grounds in the law that an immigrant could use to gain legal status.”<sup>571</sup>

But the White House, again to its credit, rejected this scholarly consensus. The White House counsel “directed Thompson to include the negative analysis about parents of ‘Dreamers’ in his formal written memo, which the administration made public.”<sup>572</sup> Further, “Eggleston argued that showing that [OLC Chief Karl] Thompson had said some steps they had considered would not be lawful would show that they had really thought about it and obeyed legal limits.”<sup>573</sup>

As Savage recounts, Eggleston said “[t]his is the high-water mark . . . . There is never going to be anything more after this.”<sup>574</sup> By putting the opinion into writing, the Obama Administration was setting in stone limits on the scope of immigration enforcement, based on the laws of Congress, that repudiated the capacious understandings advanced by the professoriate. Of course, candidate Hillary Clinton promised that she would “go as far as I can, even beyond President Obama” with “executive action to prevent deportation.”<sup>575</sup> So much for a high-water mark. Had the election turned out differently, yet another reversal would have been imminent. This “unitary” power, when not checked by either Congress, or the judiciary, will inexorably lead to the assertion of authority “in diverse contexts, including those presently unimagined,” which “will have the effect of aggrandizing the Presidency beyond its constitutional bounds and undermining respect for the separation of powers.”<sup>576</sup>

#### v. Discovery

The very action the President said he could not do in September 2011, he announced he could do six months later with DACA. On June 15, 2012, the President appeared in maladministration headquarters, the Rose Garden, to announce the new policy: “This morning, [Homeland Security] Secretary Napolitano announced new actions my administration will take,” Obama said, “to mend our nation’s immigration policy, to make it more fair, more efficient, and more just—specifically for certain young people sometimes called ‘Dreamers.’”<sup>577</sup> The President specifically referenced the DREAM Act, which passed in the House, “but Republicans blocked it” in the Senate.<sup>578</sup> (Six Democratic Senators

570. SAVAGE, *supra* note 495, at 662.

571. *Id.*

572. *Id.* at 663.

573. *Id.* at 662.

574. *Id.* at 663.

575. Paul Bedard, *Clinton: ‘I will go as far as I can, even beyond Obama’ to welcome illegal immigrants*, WASH. EXAM’R (Oct. 25, 2015, 3:32 PM), <http://www.washingtonexaminer.com/clinton-i-will-go-as-far-as-i-can-even-beyond-obama-to-welcome-illegal-immigrants/article/2574879>.

576. *NLRB v. Noel Canning*, 134 S.Ct. 2550, 2618 (2014) (Scalia, J., concurring).

577. Obama, *Remarks on Immigration*, *supra* note 458.

578. *Id.*

voted against cloture; had they supported the bill, it would have passed.)<sup>579</sup> Because Congress would not act, this is “the right thing to do.”<sup>580</sup> The newly announced policy would “lift the shadow of deportation from these young people,” allow them to “request temporary relief from deportation proceedings and apply for work authorization.”<sup>581</sup> The cycle was complete. Congress *deliberated* the DREAM Act, as the President *disclaimed* the power to use prosecutorial discretion to halt the deportation of the Dreamers. After the DREAM Act was *defeated*, internal *debates* led to a reversal of prior agency position, and the *discovery* of the power to act.

A similar sequence would play out two years later. The very action the President said he could not do in March 2014, he announced he could do six months later with DAPA. On November 20, 2014, the President addressed the nation in primetime from the Cross Hall.<sup>582</sup> The Cross Hall—where the President customarily walks with foreign heads of states or Supreme Court nominees—is a far greater venue of presidential ownership than even the Rose Garden. President Obama lamented the fact that Republicans blocked the bill: “Had the House of Representatives allowed that kind of bill a simple yes-or-no vote, it would have passed with support from both parties, and today it would be the law,” Obama said.<sup>583</sup> “But for a year and a half now, Republican leaders in the House have refused to allow that simple vote.”<sup>584</sup> In light of that intransigence, he continued, “there are actions I have the legal authority to take as President . . . that will help make our immigration system more fair and more just. Tonight, I am announcing those actions.”<sup>585</sup>

Simultaneously with the President’s address, the Department of Homeland Security released the DAPA memorandum, and OLC released the opinion explaining the policy’s legality.<sup>586</sup> Unlike DACA, which was never publicly justified—thanks to the White House counsel—the discovery of this new power was made public. With that, the maladministration cycle rinsed and repeated. Congress *deliberated* the comprehensive immigration reform bill, as the President *disclaimed* the power to use prosecutorial discretion to further halt deportations. After the bill was *defeated*, internal *debates* led to a reversal of prior agency position and the *discovery* of the power to act.

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579. U.S. Senate Roll Call Votes 111th Congress - 2nd Session, H.R. 5281 (Dec. 18, 2010, 11:09 AM), <https://perma.cc/9GYH-474H>.

580. Obama, *Remarks on Immigration*, *supra* note 458.

581. *Id.*

582. Obama, *Address to the Nation*, *supra* note 459.

583. *Id.*

584. *Id.*

585. *Id.*

586. Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents to León Rodríguez, Dir., US. Citizenship and Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot. (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf); The Dep’t of Homeland Sec’y’s Auth. to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 1 (2014) [hereinafter O.L.C.].

b. Unaccountability

I will conclude this Section with a discussion of *accountability*, which then-Professor Kagan celebrated as the most virtuous aspect of presidential administration.<sup>587</sup> In two significant regards, DAPA’s maladministration defied accountability. First, the timing of DAPA was designed to avoid the ballot box. The President announced on June 30, 2014 that he would “fix as much of our immigration system as I can on my own, without Congress.”<sup>588</sup> Initially, the White House revealed that it would complete its administrative review of possible options by the end of the summer, but as July turned to August, and August to September, those deadlines became increasingly vague.<sup>589</sup> According to the *New York Times*, “Democratic senators who were up for re-election in 2014 told the White House that an announcement by the president” before the midterm elections “could be so politically damaging in their states that it would destroy their chances to hold control of the Senate.”<sup>590</sup>

Representative Luis Gutiérrez (D-IL), a leading advocate of executive action, urged the President to act before the election. “I think I know what’s in the president’s heart, so I say to the Democrats: stand aside,” he said.<sup>591</sup> “Let the president make the decision, let him announce it and stop stopping the progress of our community toward justice. Just step aside.”<sup>592</sup> Critically, the Chicago congressman added, “It is better that the president make this decision now, clearly before the American public, in a transparent manner before the election. Let’s not be afraid for standing for our values . . . . I think if we do that, the American people will respect that.”<sup>593</sup> President Obama opted against transparency and accountability. Instead, two weeks after the election—when vulnerable Senate Democrats in North Carolina, Louisiana, and Arkansas were already defeated—the President announced DAPA.<sup>594</sup>

As a result, the massive unilateral reform of our immigration system could not be checked at the ballot. Kagan wrote that “when Congress responds (however futilely in a given case) to the President’s involvement,” a “political debate” yields “democratic scrutiny” that “should help, in the first instance, to keep the President’s exercise of authority within healthy parameters.”<sup>595</sup> This does not work when the President deliberately waits until just after the election returns, in his final term in office, to take an action that expands the bounds of his own power.

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587. Kagan, *supra* note 1, at 2331–39.

588. President Barack Obama, Remarks by the President on Border Security and Immigration Reform (June 30, 2014) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2014/06/30/remarks-president-border-security-and-immigration-reform>).

589. Shear & Preston, *supra* note 558.

590. *Id.*

591. Dan Roberts, *Immigration Tensions Bubble up Among Democrats as Midterms Near*, THE GUARDIAN (Sept. 3, 2014, 5:02 PM), <https://www.theguardian.com/world/2014/sep/03/immigration-tensions-democrats-midterm-elections>.

592. *Id.*

593. *Id.*

594. Obama, *Address to the Nation*, *supra* note 459.

595. Kagan, *supra* note 1, at 2349.

One possible rejoinder is that the President had already been elected for a full four-year term, and his authority was validated by a nationwide vote. Professor Kagan rejected this supposition: “[E]ven assuming a popular majority for a presidential candidate, bare election results rarely provide conclusive grounds to infer similar support for even that candidate’s most important positions, much less the sometimes arcane aspects of regulatory policy.”<sup>596</sup> She added, “Presidential claims of prior public validation indeed often have a tinny timbre.”<sup>597</sup> Congress, which has plenary authority over immigration, bears the greatest responsibility for this matter. The delay of DAPA was a naked effort to avoid electoral accountability.

Second, DAPA was deliberately structured so Congress could not stop it. Generally, due to the demands of bicameralism and presentment—heightened using the filibuster—and the President’s veto power, congressional overrides of executive action are extremely difficult. Kagan recognized that “majority support is not enough . . . to impose its most effective sanctions.”<sup>598</sup> She added, “although agencies do not and cannot ignore Congress, they often can get their way regardless.”<sup>599</sup> While it is usually possible, in theory at least, for Congress to defund an executive action, here it was impossible.

With “a hardball twist, the administration set up [DAPA] so that it was self-funded through applicant fees. . . . That meant Congress could not block it by refusing to appropriate taxpayer dollars for it.”<sup>600</sup> In the OLC opinion defending the legality of DAPA, the administration boasted that Congress could not defund the policy.<sup>601</sup> As I noted in the amicus brief I co-authored in *U.S. v. Texas*, “[n]ot even shutting down the federal government - or defunding the Department of Homeland Security - could halt it . . . Not only has DAPA not received congressional approval, it is expressly designed to flout Congress!”<sup>602</sup> Yet, the House of Representatives still voted to defund DAPA—a gesture that was largely symbolic.<sup>603</sup> In the Senate, Democrats filibustered an amendment to the Department of Homeland Security’s budget that purported to block the enforcement of DAPA.<sup>604</sup> The House of Representatives, left with few other options, voted to authorize an amicus brief supporting Texas’s challenge to DAPA and participated in oral arguments.<sup>605</sup>

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596. *Id.* at 2334.

597. *Id.*

598. *Id.* at 2259.

599. *Id.*

600. SAVAGE, *supra* note 495, at 660.

601. O.L.C., *supra* note 586, at 26 (“But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees.”).

602. Brief for the Cato Institute et al., *supra* note 421, at 29 (citing H.R. Res. 639, 114th Cong. (2016) (authorizing counsel to participate in oral arguments per a vote in the House of Representatives); Rebecca Shabad, *House GOP panel: Defunding Immigration Order ‘Impossible,’* HILL (Nov. 20, 2014, 11:01 AM), <http://goo.gl/97XxCq>.

603. Rebecca Shabad, *House Passes Bill to Defund Obama’s Immigration Orders*, HILL (Jan. 14, 2015, 12:06 PM), <http://thehill.com/blogs/floor-action/house/229469-house-votes-to-defund-obamas-immigration-orders>.

604. Pete Kasperowicz, *Senate Dems Block DHS Bill That Defunds Obama’s Immigration Plan*, BLAZE (Feb. 3, 2015, 3:02 PM), <https://perma.cc/V2KR-4VVQ>.

605. H.R. Res. 639, 114th Cong. (2016).

DAPA was crafted to thwart accountability before the election, and to avoid the power of the purse after the election.

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Kagan's thesis of presidential administration would suggest that courts provide greater deference when reviewing DAPA due to the President's public and oversized role in crafting the executive action. The exact opposite presumption should apply. This exercise of nonenforcement exhibits all the attributes of maladministration discussed so far. Initially, the conservative bureaucracy and longstanding internal agency precedents informed the President that he lacked the power to defer the deportations of millions of noncitizen parents of citizen children. While Congress was deliberating a comprehensive immigration reform, the President consistently repeated this precedent and announced that he could not take any further executive actions. Only after the immigration reform was defeated did the President personally initiate a reappraisal of those past precedents. When agency lawyers presented him with options, defining the outer bounds of his executive power, he told them to go further. Ultimately, the plan was not announced until after the midterm election—to shield vulnerable Senators from democratic accountability—and was structured so that Congress could not defund it. The President's close involvement in this action should be met with a heightened degree of skepticism.

#### D. *Presidential Intrusion*

The final stop on this whirlwind tour of maladministration is *presidential intrusion*, which occurs when the President personally influences an independent regulatory agency to adopt his preferred policy. This species is at once the easiest to allege and the hardest to prove. First, all regulatory comments filed by the executive branch in a rule-making are a matter of public record.<sup>606</sup> Second, due to public disclosure laws, the executive branch is required to register all *ex parte* visits with members of independent agencies (although the substance of those discussions is not disclosed in detail).<sup>607</sup> Thus, there is near-complete transparency when the White House uses its bully pulpit to exert pressure on independent agencies. The difficulty, however, lies in assessing the impact of that influence. This final Part studies the Obama Administration's coordinated efforts to lobby the Federal Communications Commission ("FCC") over the net neutrality rule. At a minimum, this interference creates an appearance of impropriety, and sets a precedent for future, more expansive presidential intrusions.

##### 1. *Open Internet*

Since 2008, the FCC has attempted to assert jurisdiction over internet service providers' ("ISP") network management practices to compel "internet openness—commonly known as net neutrality—the principle that broadband

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606. 5 U.S.C. § 552 (2012).

607. *Id.* § 553.

providers must treat all internet traffic the same regardless of source.”<sup>608</sup> Before February 26, 2015, the FCC classified ISPs as “information service” providers under Title I of the Communications Act of 1934.<sup>609</sup> On that day, however, the FCC through a divided 3-2 vote *reversed* its previous position and “reclassified broadband service as a telecommunications service, subject to common carrier regulation under Title II of the Communications Act” of 1934.<sup>610</sup>

Relevant for our purposes is *how* the independent agency arrived at this reversal. In *Verizon v. FCC*, the D.C. Circuit Court of Appeals rejected an earlier regulatory effort to promote net neutrality.<sup>611</sup> Four months later, the FCC approved a Notice of Proposed Rulemaking (“NPRM”) following “the blueprint offered” by Judge David Tatel’s majority opinion in *Verizon*.<sup>612</sup> Specifically, the FCC “propose[d] to rely on section 706 of the Telecommunications Act of 1996.”<sup>613</sup> “At the same time, the Commission [indicated it would] . . . seriously consider the use of [the far broader] Title II of the Communications Act as the basis for legal authority.”<sup>614</sup> The NPRM emphasized “that both section 706 and Title II are viable solutions and seek comment on their potential use.”<sup>615</sup>

## 2. *Presidential Administration and Independent Agencies*

Independent agencies, such as the FCC, consist of five members—three nominated from the President’s party, and two from the opposite party—who cannot be removed at the President’s pleasure.<sup>616</sup> In this sense, the commissioners are insulated from political pressure. But the executive branch can still attempt to affect the agency. In 1991, the Office of Legal Counsel ruled that “it is permissible for White House officials to contact FCC Commissioners in an effort to influence the results of an FCC rulemaking” so long as the *ex parte* meetings are disclosed.<sup>617</sup> President Bush’s counsel, C. Boyden Gray, however, released a memorandum for White House personnel stating that *ex parte* conduct was not permitted, “as a general rule . . . when such a contact may imply preferential treatment or the use of influence on the decision-making process.”<sup>618</sup> Officials in the White House, the memo explained, “should avoid even the mere appearance of interest or influence—and the easiest way to do so is to avoid discussing matters pending before the independent regulatory agencies with interested parties and avoid making *ex parte* contacts with agency personnel.”<sup>619</sup>

608. *United States Telecom Ass’n v. Fed. Commc’ns Comm’n*, 825 F.3d 674, 689 (D.C. Cir. 2016).

609. *Id.*

610. *Id.* (citing *In the Matter of Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5682–83 ¶ 188, 5751 ¶ 346 (2015)).

611. *Verizon v. F.C.C.*, 740 F.3d 623, 659 (D.C. Cir. 2014).

612. *In the Matter of Protecting & Promoting the Open Internet*, 29 F.C.C. Rcd. 5561, 5563 (2014).

613. *Id.*

614. *Id.*

615. *Id.*

616. *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935).

617. *John O. McGinnis, Ex Parte Communications During FCC Rulemaking*, 15 U.S. Op. O.L.C. 1, 3 (1991).

618. *Id.* at 4.

619. *Id.*



That policy ostensibly continued through the next presidency. Professor Kagan recalled that her former boss, President Clinton, “importantly . . . refrained from trying to exercise his usual techniques of control over independent agencies.”<sup>620</sup> She noted that Clinton went as far as “occasionally wr[iting] letters to independent agencies requesting them to investigate or take action on issues within their jurisdictions, and highlighted these appeals in public appearances.”<sup>621</sup> But these “echoes . . . [were] only ever so faint, of how Clinton functioned with respect to executive branch agencies” under his direct control.<sup>622</sup> Kagan characterized his role during these rule-making processes “not as the commander, but as a simple petitioner of the administrative state.”<sup>623</sup> In rare cases, the “President and his staff might participate extensively in the occasional legal interpretation offered by an independent commission.”<sup>624</sup> But for the most part, due to independent agencies’ “insulation from presidential removal power,” staggered leadership “of diverse parties,” and “norms of independence,” the appearance of undue influence was avoided.<sup>625</sup>

Because of this separateness, Kagan’s entire presidential-administration framework is split based on whether an agency is independent. With a “rough cut,” Kagan bifurcates regulations between “actions taken by executive branch agencies and those taken by independent commissions.”<sup>626</sup> For independent agencies, Kagan wrote, “the gap between the agency and the President almost inexorably widens,” due to “longstanding (even if psychological) norms of independence.”<sup>627</sup> With respect to the Open Internet Rule in 2014, however, the gap between the agency and the President inexplicably narrowed.

### 3. “Hybrid” Approach

Leading up to the notice of proposed rule-making, FCC Chairman Tom Wheeler strongly hinted that he would not favor a complete reclassification under Title II. To the contrary, in December 2013, Wheeler suggested that he would tolerate some forms of paid prioritization.<sup>628</sup> On May 15, 2014—the same day the rule-making was announced—David Krone, who served as Senate Majority Leader Harry Reid’s Chief of Staff, emailed Wheeler. “Spoke again last night with the WH [White House],” Krone wrote,” and told them to back off Title II.”<sup>629</sup> He added he “went through once again the problems it creates for

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620. Kagan, *supra* note 1, at 2308.

621. *Id.*

622. *Id.*

623. *Id.* at 2308–09.

624. *Id.* at 2377.

625. *Id.* at 2376–77.

626. *Id.* at 2376.

627. *Id.* at 2376–77.

628. Brian Fung and Nancy Scola, *Obama’s Call for an Open Internet Puts Him at Odds with Regulators*, WASH. POST (November 11, 2014), [https://www.washingtonpost.com/news/the-switch/wp/2014/11/11/the-fcc-weighs-breaking-with-obama-over-the-future-of-the-internet/?utm\\_term=.da68382e90ad](https://www.washingtonpost.com/news/the-switch/wp/2014/11/11/the-fcc-weighs-breaking-with-obama-over-the-future-of-the-internet/?utm_term=.da68382e90ad).

629. Lawrence E. Strickling, *RE: Ex Parte Filing; Framework for Broadband Internet Service (GN Docket No. 10-127); Open Internet Rulemaking (GN Docket No. 14-28)*, UNITED STATES DEPARTMENT OF COMMERCE (November 10, 2014), <https://oversight.house.gov/wp-content/uploads/2015/03/FCC-Hearing-Packet.pdf> [hereinafter *Hearing Packet*].

us.”<sup>630</sup> The clear impression was that both Krone and Wheeler were fighting off White House pressure concerning Title II reclassification.

By the end of October, several media outlets reported that Wheeler still opposed the full reclassification approach. According to the *Wall Street Journal*, Wheeler’s proposal would “expand[] the agency’s authority over broadband service,” but “isn’t expected to satisfy all proponents of ‘net neutrality.’”<sup>631</sup> Specifically, the *Journal* stated that Wheeler would not go so far as to reclassify all broadband as a “common carrier, or a public utility” under Title II.<sup>632</sup> Instead, “Mr. Wheeler is close to settling on a hybrid approach.”<sup>633</sup> Under this bifurcated approach, retail consumers and wholesale providers were treated differently. Broadband providers could offer paid prioritization to retail consumers, such that they could be charged extra for certain kinds of traffic. Broadband providers, however, could not be charged extra for wholesale, backend users of bandwidth. FCC commissioner Ajit Pai confirmed that at this time, the “agency was publicly considering a so-called ‘hybrid’ approach.”<sup>634</sup>

On Halloween 2014, the *New York Times* suggested that the “hybrid solution” had “gained favor” over the previous two months.<sup>635</sup> Wheeler, in his testimony before the House of Representatives in March 2015, stressed that the *New York Times* also reported that the “hybrid” approach was only “one of four possibilities that the F.C.C. is considering,”<sup>636</sup> and that a complete Title II reclassification was “very much on the table.”<sup>637</sup>

According to a report released by the majority staff of the Committee on Homeland Security and Governmental Affairs, career staff at the FCC planned to work through the weekend of Saturday, November 8 and Sunday, November 9 to complete the draft of the “hybrid” plan.<sup>638</sup> Their goal was to provide Wheeler with a draft by Monday, November 10 so it could be circulated to the Commission on November 20.<sup>639</sup> That would have been the latest possible date for the proposal to appear on the December 2014 Open Meeting agenda.<sup>640</sup>

That frantic pace would soon be halted, however. On November 6, 2014, Jeffrey Zients—director of the White House’s National Economic Council—

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630. *Id.*

631. Gautham Nagesh, *FCC Net Neutrality Plan Calls for More Power Over Broadband*, WALL ST. J. (Oct. 30, 2014, 7:31 PM), <https://www.wsj.com/articles/fcc-net-neutrality-plan-calls-for-more-power-over-broadband-1414712501>.

632. *Id.*

633. *Id.*

634. AJIT PAI, DISSENTING STATEMENT OF COMMISSIONER AJIT PAI 23 (Feb. 25, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-15-24A5.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A5.pdf) [hereinafter PAI, STATEMENT].

635. Edward Wyatt, *F.C.C. Considering Hybrid Regulatory Approach to Net Neutrality*, N.Y. TIMES (Oct. 31, 2014) <https://www.nytimes.com/2014/11/01/technology/fcc-considering-hybrid-regulatory-approach-to-net-neutrality.html>.

636. *Id.*

637. *Is the FCC Responding to the Needs of Small Business and Rural America? Before the H. Comm. on Small Bus.*, 113th Congress 5 (2014) (statement of the Thomas Wheeler, Chairman, F.C.C.) [hereinafter Hearing].

638. Sen. Ron Johnson, Staff of Comm. on Homeland Sec. and Gov. Affairs, *Regulating the Internet: How the White House Bowled Over FCC Independence* 5 (2016).

639. *Id.* at 5, 12.

640. *Id.* at 12.

paid an *ex parte* visit to Wheeler at FCC headquarters. Zients told Wheeler that the President “was ready to unveil his vision for regulating high-speed Internet traffic.”<sup>641</sup> Mr. Obama’s proposal would call for a full reclassification of broadband services under Title II. During this period, the White House produced a snazzy two-minute YouTube video featuring the Vlogger-in-Chief announcing his support of Title II reclassification.<sup>642</sup> The administration determined that the video would go online the morning of November 10. And someone in the White House tipped off PopularResistance.org.

#### 4. November 10, 2014

At 6:55 AM on the morning of November 10,<sup>643</sup> five protestors stood in front of Tom Wheeler’s driveway, blocking his Mini Cooper from pulling out. One said “I’m sorry but we can’t let you go to work today because you work for Comcast, Verizon, and AT&T and not for the people.”<sup>644</sup> Another protestor rejected his “hybrid” proposal. “Save the internet Tom. It’s not good enough to be doing this hybrid crap. Reclassification all the way.”<sup>645</sup> Initially, Wheeler was a good sport and helped the protestors hold up a banner that read “Save the Internet.”<sup>646</sup> The protestors told him not to hold the sign and make it seem “like you are saving the internet.”<sup>647</sup> Wheeler told them, “I have long stated that everything is on the table, and I am working on Title II solutions.”<sup>648</sup> Another protestor replied, “we don’t want Title II solutions, we want full Title II.”<sup>649</sup>

The now-frustrated FCC commissioner told the protestors, “[y]ou are blocking my driveway, and prohibiting my rights. Do I have a right? Can I get out of my driveway now?”<sup>650</sup> They would not move. Ultimately, Wheeler went back inside his house. The video, uploaded to YouTube at 8:45 AM by Popular-Resistance.org, was captioned “Chairman of the FCC Tom Wheeler confronted in his driveway about his ‘hybrid’ proposal for the internet that ignores 99% of 4 million comments demanding Title II net neutrality.”<sup>651</sup>

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641. Gautham Nagesh & Brody Mullins, *Net Neutrality: How White House Thwarted FCC Chief*, WALL ST. J. (Feb. 4, 2015, 7:52 PM), <http://on.wsj.com/2ekTrqB>.

642. The Obama White House, *President Obama’s Statement on Keeping the Internet Open and Free*, YOUTUBE (Nov. 10, 2014), <https://www.youtube.com/watch?v=uKcjQPVwFDk>. [hereinafter Obama Video].

643. Staff, *Breaking: Net Neutrality Activists Blockade FCC Chairman Tom Wheeler’s House*, POPULAR RESISTANCE (Nov. 10, 2014), <https://perma.cc/NR23-F3CD>.

644. Elias Weston-Farber, *FCC’s Tom Wheeler Confronted*, YOUTUBE (Nov. 10, 2014), <https://youtu.be/DJZdfgvMXec>.

645. *Id.*

646. *Id.*

647. *Id.*

648. *Id.*

649. *Id.*

650. *Id.*

651. *Id.*

Forty-one minutes later,<sup>652</sup> President Obama offered a similar message with a blog post<sup>653</sup> and YouTube video of his own.<sup>654</sup> The President called on the FCC to regulate all broadband services under Title II.<sup>655</sup> “To put these protections in place, I’m asking the FCC to reclassify internet service under Title II of the law known as the Telecommunications Act.”<sup>656</sup> Mr. Obama acknowledged, “the FCC is an independent agency, and ultimately the decision is theirs alone.”<sup>657</sup> But with four million filed comments, “Americans are making their voices heard, standing up for the principles that make the internet a powerful force for change. As long as I’m president, that’s what I’ll be fighting for, too.”<sup>658</sup> The blog post accompanying the video stated that “the President has laid out a plan to do it, and is asking the FCC to implement it.”<sup>659</sup>

Internally, the reaction to the President’s video was swift. Barely an hour later, at 10:45 AM, Wheeler issued a press release stating that the Commission “will incorporate the President’s submission into the record of the Open Internet proceeding,” but stressed that the FCC is “an independent regulatory agency.”<sup>660</sup> The fact that the polished press release was sent to the media so quickly after the President’s video was posted—and while Wheeler was still blocked in his driveway—suggests it was drafted in advance after the heads-up from Zients. Indeed, the Majority Staff Report concluded that the FAQ was drafted over the weekend following Zients’s visit, as part of “damage control.”<sup>661</sup> In a draft of the FAQ dated November 9, one FAQ asked “[h]as there been discussions between the WH and the FCC leading up to this rollout?”<sup>662</sup> The proposed answer: “The FCC kept the WH apprised of the process thus far, but there have not been substantive discussions.”<sup>663</sup> Following this answer, the “document drafter asked incredulously: ‘IS THIS RIGHT?’”<sup>664</sup> The purpose of this anticipated FAQ, according to internal emails, was to avoid “shoot[ing] holes into POTUS[’s] proposal and taking a swing at Title II.”<sup>665</sup>

The career, nonpartisan staff at the FCC quickly recognized that the President’s submission would affect the drafting process. As late as the night before, on Sunday, November 9, the staff worked “diligently” to prepare a draft order

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652. The time can be calculated using Amnesty International’s YouTube DataViewer, which extracts the time posted—and other meta data—from YouTube clips. See YouTube Data Viewer, <https://citizenevidence.amnestyusa.org/>.

653. *Net Neutrality: The President’s Plan for a Free and Open Internet*, WHITE HOUSE (Nov. 10, 2014), <https://perma.cc/2QCN-3YWD> [hereinafter White House Blog].

654. Obama Video, *supra* note 643.

655. *Id.*

656. *Id.*

657. *Id.*

658. *Id.*

659. White House Blog, *supra* note 653.

660. FCC Chairman Tom Wheeler’s Statement on President Barack Obama’s Statement Regarding Open Internet (Nov. 10, 2014), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-330414A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-330414A1.pdf).

661. Johnson, *supra* note 639, at 13.

662. *Id.* at 14.

663. *Id.*

664. *Id.*

665. *Id.*

based on the “hybrid” model by Monday.<sup>666</sup> After the meeting with Zients, however, Wheeler and his senior staff “had already changed direction.”<sup>667</sup> One staffer opined, “Not sure how this will affect the current draft and schedule—but I suspect substantially.”<sup>668</sup> Another employee, in response to the President’s blog post, wrote that “[t]his might explain our delay.”<sup>669</sup> The staffer, who had spent the weekend working on the “hybrid” order, added “at least the delay in edits from above makes sense.”<sup>670</sup>

At 11:02 AM, Phillip Verveer, who served as senior counselor to the Chairman, forwarded comments from AT&T’s lobbyist about Obama’s video. “This is awful. And bad for any semblance of agency independence too,” the lobbyist wrote.<sup>671</sup> “Too many people saw Zients going to meet with Tom last week.”<sup>672</sup> Verveer wrote to Wheeler, “FYI.”<sup>673</sup> The *Washington Post* interviewed three people who met with Wheeler after the release of the video. They related “that the pressure on the chairman is clearly having an impact” on him.<sup>674</sup> During a meeting, he “complained how the process has become ‘politicized.’”<sup>675</sup> Yet those same three people insisted that he was “still not ready to give up on the agency’s hybrid proposal,” though “he was ‘adamant’ that all options remain on the table.”<sup>676</sup>

Later that afternoon, at 2:35 PM, a staff member recognized that the “Open Internet is on pause.”<sup>677</sup> After several weeks of the holding pattern, Wheeler “instructed FCC staff to follow a pure Title II reclassification.”<sup>678</sup> In turn, the Open Internet order was removed from the December 2014 meeting agenda.<sup>679</sup> When asked to explain the delay, Wheeler blamed his “staff” that “just couldn’t get the work done.”<sup>680</sup> The Senate Report, noting that the staff was prepared to work throughout the weekend, concluded that the “only impediment to getting the work done appears to be the White House’s intervention.”<sup>681</sup>

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666. *Id.* at 13.

667. *Id.*

668. *Id.* at 10.

669. *Id.*

670. *Id.*

671. STAFF OF COMM. ON HOMELAND SEC. AND GOV. AFFAIRS, FCC: PROCESS AND TRANSPARENCY 16 (2015).

672. Hearing Packet, *supra* note 629.

673. *Id.*

674. Brian Fung, *How Obama’s Net Neutrality Comments Undid Weeks of FCC Work*, WASH. POST (Nov. 14, 2014), [https://www.washingtonpost.com/news/the-switch/wp/2014/11/14/how-obamas-net-neutrality-comments-undid-weeks-of-fcc-work/?utm\\_term=.2f2409ae4baa](https://www.washingtonpost.com/news/the-switch/wp/2014/11/14/how-obamas-net-neutrality-comments-undid-weeks-of-fcc-work/?utm_term=.2f2409ae4baa).

675. *Id.*

676. *Id.*

677. Johnson, *supra* note 638, at 16.

678. *Id.*

679. *Id.*

680. *Id.* at 15.

681. *Id.*

## 5. “Pressure”

Over the next few months, Wheeler’s position would “evolve.”<sup>682</sup> On January 7, 2015, Wheeler dismissed the “hybrid” approach during a Q&A session at a conference.<sup>683</sup> One month later, in an editorial in *Wired*, Wheeler announced that he would propose that the “FCC use its Title II authority to implement and enforce open internet protections.”<sup>684</sup>

Shortly after the rule was finalized in March 2015, Wheeler was criticized for changing his position based on pressure from the Obama Administration. Commissioner Ajit Pai, who dissented from the rule, stated that “[i]t strains credulity to think” the President’s “endorsement of Title II” did not “force[] a change in the FCC’s approach.”<sup>685</sup> If the FCC had “been on track to adopt the President’s plan all along, there would have been no need for him to ‘la[y] out a plan to do [Title II]’ and (critically) ‘ask[] the FCC to implement it.’”<sup>686</sup> Pai added that the FCC “was headed in a different direction until political pressure was applied.”<sup>687</sup>

The FCC’s Office of the Inspector General (“OIG”) opened an investigation into the rule-making process.<sup>688</sup> In its March 2016 semi-annual report, OIG noted that the net neutrality rules “continue to generate interest in both the House of Representatives and the Senate and have been the subject of discussions between OIG and various congressional committees,” but no details were offered.<sup>689</sup>

During a hearing conducted by the House Committee on Oversight and Government Reform, Representative Steve Russell (R-OK) stated the concern succinctly: “[G]iven the coordinated efforts in the pressure of the White House, the coincidentally timed protest, and other White House Statements, would it be unreasonable, then, for Americans to somehow feel betrayed that this decision was a cave against your earlier judgment and damaged the reputation of the FCC as an independent agency?”<sup>690</sup> Wheeler answered unequivocally, “[n]o.”<sup>691</sup> In written responses submitted to Congress, he acknowledged that the “President’s public support for [Title II reclassification] gave [the process] new momentum,” and “put wind in the sails of everyone looking for strong open Internet protections,”<sup>692</sup> but it did not pressure his choice.

682. Hearing Packet, *supra* note 629, at 23.

683. Megan Geuss, *Title II for Internet Providers Is All but Confirmed by FCC Chairman*, ARS TECHNICA (Jan. 7, 2015, 5:22 PM), <https://arstechnica.com/information-technology/2015/01/title-ii-for-internet-providers-is-all-but-confirmed-by-fcc-chairman/>.

684. Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, WIRED: OPINION (Feb. 4, 2015, 11:00 AM), <https://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/>.

685. PAI, STATEMENT, *supra* note 634, at 23.

686. *Id.* at 23 n.145.

687. *Id.* at 23.

688. *FCC Chairman Wheeler Denies Obama Pressured Him on Net Neutrality*, FOX NEWS (Mar. 17, 2015), <http://www.foxnews.com/politics/2015/03/17/fcc-chair-wheeler-denies-obama-pressured-him-on-how-to-regulate-internet.html>.

689. 2015–2016 FCC SEMI-ANNUAL REP. at 6.

690. Hearing Packet, *supra* note 629, at 44.

691. *Id.* at 45.

692. *Id.* at 5, 62.

Wheeler was confident in his decision-making process. “There is no way I am apologetic,” he said.<sup>693</sup> “I am fiercely proud of this decision.”<sup>694</sup> He rejected the GOP’s allegations, contending that President Obama had no undue influence on the process. “There were no secret instructions from the White House,” Wheeler said.<sup>695</sup> “I did not, as CEO of an independent agency, feel obligated to follow the President’s recommendation. But I did feel obligated to treat it with the respect it deserves just as I have with similar respect the input both pro and con—from 140 senators and representatives.”<sup>696</sup> Wheeler later referred to the President’s video, which echoed the comments of nearly four million people as merely “piling on.”<sup>697</sup>

I have no doubt that Wheeler’s testimony is sincere, but the appearance of maladministration from presidential intrusion onto an independent agency is inescapable. For example, a reporter asked Wheeler why he did not file *ex parte* notices for a dozen of his meetings at the White House. Wheeler’s senior counsel responded, “‘I assume the answer is that there literally was no advocacy’ during the meetings between Chairman Wheeler and White House personnel.”<sup>698</sup> The reporter replied that the answer was “hard to believe.”<sup>699</sup>

Even net neutrality advocates sensed that their rent seeking worked. Evan Greer of the group Fight for the Future emailed his colleagues a week after the President’s video was released, observing that “the only thing that could stop FCC Chairman Tom Wheeler from moving ahead with his sham proposal to gut net neutrality was if we could get the President to step in.”<sup>700</sup> Greer then boasted that “we did everything in our power to make that happen. We took the gloves off and played hard, and now we get to celebrate a sweet victory.”<sup>701</sup> Greer pointed out that Obama’s statement “incorporates the memes and talking points we’ve built, together.”<sup>702</sup> In September, a representative from Fight for the Future joined two-dozen other activists supporting net neutrality at the White House.<sup>703</sup> These groups were given access to the administration, and—at least in their minds—influenced the process.

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693. *Id.* at 38.

694. *Id.*

695. *Id.* at 5.

696. *Id.*

697. *Id.* at 52.

698. Johnson, *supra* note 638, at 25.

699. *Id.*

700. Kerry Picket, *Obama’s Move to Regulate Internet Has Activists’ ‘Fingerprints All Over It,’* DAILY CALLER (Feb. 23, 2015, 12:36 PM), <http://dailycaller.com/2015/02/23/obamas-move-to-regulate-internet-has-activists-fingerprints-all-over-it/>.

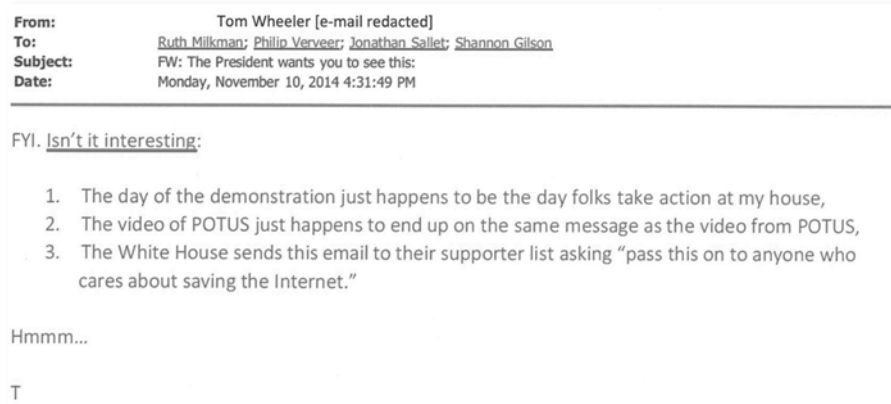
701. *Id.*

702. *Id.*; see also *Environmental Protection Agency – Application of Publicity or Propaganda and Anti-Lobbying Provisions*, GAO (Dec. 14, 2015), <http://www.gao.gov/products/B-326944> (explaining that the U.S. Government Accountability Office found the EPA “violated publicity or propaganda and anti-lobbying provisions contained in appropriations acts with its use of certain social media platforms in association with its ‘Waters of the United States’ (WOTUS) rulemaking in fiscal years 2014 and 2015. Specifically, EPA violated the publicity or propaganda prohibition though its use of a platform known as Thunderclap that allows a single message to be shared across multiple Facebook, Twitter, and Tumblr accounts at the same time. EPA engaged in covert propaganda when the agency did not identify EPA’s role as the creator of the Thunderclap message to the target audience.”).

703. *Attendees at 9/23/14 White House Meeting with OSTP’s David Edelman*, DAILY CALLER, [http://dailycaller.com/wp-content/uploads/2015/02/list\\_WH\\_NN.pdf](http://dailycaller.com/wp-content/uploads/2015/02/list_WH_NN.pdf).

One question lingers. If there was no coordination, how did the protestors know to appear in Wheeler's driveway hours before the President would post the video? At a minimum, there was some synergy between the White House and the activists. The same supposition crossed Wheeler's mind. At 4:31 PM on the very busy day of November 10, Wheeler emailed his Chief of Staff, Senior Counselor, General Counsel, and Communications director:

FIGURE 1



At the risk of sounding conspiratorial, I will let Wheeler's "Hmmm. . ." speak for itself. Community organizing, meet notice and comment.

Wheeler at least had a good sense of humor about the process. During remarks at the Federal Communications Bar Association, he joked "I would like to thank the Mozilla Foundation," which proposed the hybrid rule, "for the first draft of my remarks tonight, and President Obama for his edits."<sup>704</sup>

#### 6. "Is really anything new?"

After the rule was finalized, several broadband providers challenged it. The district court ruled for the government. In June 2016, a divided panel of the D.C. Circuit denied the petition for review.<sup>705</sup> Relevant for our analysis, the majority opinion (jointly authored by Judges Tatel and Srinivasan) and the partial dissent (by Judge Williams) differed over whether the agency provided sufficient reasoning to justify the reversal and discovery. The majority opinion was not troubled in the least by the Commission's reversal. "[N]othing in the Telecommunications Act" of 1934, the court noted, "suggests that Congress intended to freeze in place the Commission's existing classifications of various services."<sup>706</sup> Rather, as the Supreme Court noted in *Brand X*, the "classification of broadband 'turns . . . on the factual particulars of how Internet technology works and how it is provided, questions *Chevron* leaves to the Commission to resolve in the first

704. Brooks Bolick, Alex Byers & Bill Duryea, *The FCC Chair's Internet Pivot*, POLITICO (Feb. 2, 2015, 5:36 AM), <http://www.politico.com/story/2015/02/tom-wheeler-net-neutrality-114785>.

705. U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 778 (D.C. Cir. 2016).

706. *Id.* at 703.



instance.”<sup>707</sup> Further, the court rejected intervenor TechFreedom’s “urg[ing] . . . to exercise ‘judicial skepticism of the [Commission’s] power grab’” following its longstanding disclaimer of such authority.<sup>708</sup> The majority distinguished *FDA v. Brown & Williamson Tobacco*, finding that “Congress had ‘precluded’ the FDA from regulating cigarettes,” whereas with the Communications Act, “by leaving a statutory ambiguity, had delegated to the Commission the power to regulate broadband service.”<sup>709</sup>

In dissent, Judge Williams concluded that the FCC’s “justification of its switch in classification of broadband from a Title I information service to a Title II telecommunications service fails for want of reasoned decision making.”<sup>710</sup> The Commission’s justifications based on “new policy perceptions” were “watery thin and self-contradictory.”<sup>711</sup> Under the Supreme Court’s framework in *Fox v. FCC*, the dissent noted, courts are required “to examine whether there is really anything new.”<sup>712</sup> The two reasons offered by the Commission—consumers use broadband “to access third party content” and providers emphasize “speed and reliability”—were not new, but existed when the Commission previously declined to exercise this authority in 2010.<sup>713</sup> Judge Williams observed that the FCC “has now discovered, for reasons still obscure” that its previous pronouncement that “broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market”<sup>714</sup> should now be replaced “with a regime that is far from ‘minimal.’”<sup>715</sup> It is hard to read this circumlocution without thinking of the Obama Administration’s nudging.

The majority opinion, recognizing that the FCC departed from its previous position, and that these circumstances prevailed as early as 2002, offered only a partial rejoinder to this reversal.<sup>716</sup> Because the “Commission cited ample record evidence supporting its current view that consumers perceive a standalone offering of transmission,” it satisfied the Court’s framework in *Fox v. FCC* by offering a “reasoned explanation . . . for disregarding facts and circumstances that underlay . . . the prior policy.”<sup>717</sup> The joint opinion concluded, “Nothing

707. *Id.* (quoting *Nat’l Cable & Telecomm. Ass’n v. Brand X*, 545 U.S. 972, 991 (2005)).

708. *Id.* at 704 (quoting TechFreedom Intervenor Br. 18).

709. *Id.*; see *supra* Subsection III.B.1. This is not a complete account of the Court’s major question doctrine jurisprudence. *Brown & Williamson*, and its progeny, have reiterated that even with an ambiguous statute, at *Chevron* Step Zero, courts can consider the novelty of the position under certain extreme circumstances. *Gridlock*, *supra* note 463, at 261; see *Util. Air Reg. Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (“When an agency claims to discover in a long-extant statute an unheralded power to regulate ‘a significant portion of the American economy,’ we typically greet its announcement with a measure of skepticism.”); see also *U.S. Telecom Ass’n*, 825 F.3d at 749 (applying the major question doctrine appropriately when the dissent pointed out, “for nearly four decades [the FCC] made the presence or prospect of competition the touchstone for refusal to apply Title II.”).

710. *U.S. Telecom Ass’n*, 825 F.3d at 744 (Williams, J., dissenting).

711. *Id.*

712. *Id.* at 745.

713. *Id.* at 748.

714. *Id.* at 749; *Nat’l Cable & Telecomm. Ass’n v. Brand X*, 545 U.S. 972, 1001 (2005).

715. *U.S. Telecomm. Ass’n*, 825 F.3d at 749 (D.C. Cir. 2016).

716. *Id.* at 709.

717. *Id.* (quoting *FCC v. Fox Television Stations Inc.*, 556 U.S. 502 at 515–16 (2009)).

more is required.”<sup>718</sup> Judge Williams replied that he does “not understand the majority’s view that the section of *Fox* on changed circumstances, quoted above, is not triggered so long as the agency’s current view of the circumstances is sustainable.”<sup>719</sup> The Open Internet order “explicitly invokes changed circumstances.”<sup>720</sup> To this charge, the joint opinion demurred. “But we need not decide whether there ‘is really anything new,’” the majority explained, because “the Commission concluded that changed factual circumstances were not critical to its classification decision.”<sup>721</sup> In other words, the Commission argued that even if circumstances had not changed, it was reversing its previous positions because that was their current judgment. The majority looked the other way at the possible effects of presidential intrusion.

In May 2017, the D.C. Circuit denied rehearing *en banc* in this case. Judge Janice Rogers Brown’s dissent tracks very closely the theme of presidential intrusion, referring to it as “presidential interference.”<sup>722</sup> She explained:

When all the statutory somersaults, revisionist history, and judicial abdication are done, we are still left with a lingering question: Why, on the verge of announcing a new Open Internet Order in 2014 that both implemented “net neutrality” principles and preserved broadband Internet access as an “information service,” would the FCC instead reclassify broadband Internet access as a public utility? Simple. President Obama pressured the FCC to do it. This Court once held “an agency may not repudiate precedent simply to conform with a shifting political mood.” *Nat’l Black Media Coal. v. FCC*, 775 F.2d 342, 356 n.17 (D.C. Cir. 1985). Alas, here we see the exception that kills the rule.<sup>723</sup>

Judge Brown added that when the “President seeks to shape the agency’s deliberations transgress legal procedures designed to ensure public accountability—like notice-and-comment requirements and rules regarding *ex parte* communications—he undermines the accountability rationale for confining executive Power to the President.”<sup>724</sup> She expressly contrasted President Obama’s actions with then-Professor Kagan’s conclusion that “the degree to which the public can understand the sources and levers of bureaucratic action” is a “fundamental precondition of accountability in administration.”<sup>725</sup> With this frame, Judge Brown concluded, “the President sought to change this law not by petitioning Congress,

718. *Id.*

719. *Id.* at 748. (Williams, J., dissenting).

720. *Id.*; *Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601, 5743 (2015) (“*Changed factual circumstances* cause us to revise our earlier classification of broadband Internet access service.”) (emphasis added).

721. *U.S. Telecom Ass’n*, 825 F.3d at 709; *Protecting & Promoting the Open Internet*, 30 FCC Rcd. at 5769 (“[E]ven assuming, *arguendo*, that the facts regarding how [broadband service] is offered *had not changed*, in now applying the Act’s definitions to these facts, we find that the provision of [broadband service] is best understood as a telecommunications service, as discussed [herein] . . . and *disavow our prior interpretations to the extent they held otherwise.*”) (emphasis added).

722. *U.S. Telecom Ass’n*, 855 F.3d at 409 (Brown, J., dissenting).

723. *Id.* at 409–10.

724. *Id.* at 413.

725. *Id.* (quoting Kagan, *supra* note 1, at 2332).

but by influencing the FCC’s deliberations over how to enforce existing law.”<sup>726</sup> Alas, her opinion was only a dissent.

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Judicial deference for the decisions of an independent agency is heightened precisely because of its insulation from the political process. The pivotal structural protection—the President cannot remove the commissioners without cause—provides courts with the confidence that the rules the commission reaches are not merely the dictates of the White House. Presidential intrusion frustrates those norms. Even if Wheeler was not influenced by the coordinated barrage of pressure, the appearance of impropriety is palpable. Moving far away from the norms of the Bush and Clinton Administrations, the Obama Administration has set a new precedent for the relationship between the executive branch and independent commissioners. If evidence of this form of maladministration grows, courts should revisit their willingness to defer to changed positions by administrative agencies and demand reasoned decision making beyond stating that “circumstances changed.”

#### IV. CONCLUSION

The 2016 presidential election, as the government shifts from one party to another, provides a natural experiment to test the four species of presidential maladministration. First, the Trump Administration will likely engage in *reversals* of policy, with respect to immigration, healthcare, national security, and countless other areas. Further, the Justice Department will have to consider what positions it will take in already pending cases involving the contraceptive mandate to the Affordable Care Act, payments of cost-sharing subsidies to insurance companies, as well as discrimination claims based on gender identity. In each case, the courts will have to assess whether, and to what extent, these reversals should affect the executive branch’s pleas for deference.

Second, soon enough the Trump Administration will find itself unable to enact change through legislative channels and will turn to *discovery*. By citing long-extant statutes, regulations, and even court cases, the executive branch can aggrandize the authority to increase enforcement of immigration laws, enhance national security protections, and even sideline intransigent bureaucracies. All the while, the White House will likely cite as precedent President Obama’s invocation of gridlock as a license to engage in creative leadership.

Third, more often than not, *nonenforcement* inures to benefits of limited-government conservatives. While President Obama utilized nonenforcement to protect immigrants, safeguard the environment, and salvage the Affordable Care Act, President Trump can use the same authority to suspend protections for immigrants, waive environmental safeguards, and unravel the Affordable Care Act. Questions of standing and justiciability, though dodged in *U.S. v. Texas*, will return to the fore.

Finally, to the extent that independent agencies thwart President Trump’s agenda, courts may find themselves forced to confront *intrusion*. Specifically,

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726. *U.S. Telecom Ass’n*, 855 F.3d at 415.

progressives will assert that the critical independence of these commissions, and the separation of powers, are thwarted when the White House exerts undue influence. The episode leading up to the net neutrality rule, perversely, will provide a strong precedent for President Trump's nudging.

In a prescient blog post, Harvard law professor Adrian Vermeule imagines the future shifts of the conservative and progressive legal movements as if they were dancers at a ball in a Jane Austen novel: "two lines of dancers switch to opposite sides of the ballroom" and "the dance goes on as before."<sup>727</sup> After this switch, "[t]he structure of the dance at the group level is preserved; none of the rules of the dance change; but the participants end up facing in opposite directions."<sup>728</sup> Call it *Administration and Maladministration*.

## V. POSTSCRIPT

I began writing this article during the spring of 2016, but, due to the particularities of the law review publication cycle, it was not finalized until the spring of 2018. During that period, many of the ideas discussed in this Article came to fruition, far quicker than I could have ever fathomed. Though not yet published, *Presidential Maladministration* has already made an impact on the literature with citations in the Foreword to the *Harvard Law Review*<sup>729</sup> and in the *New York Times*.<sup>730</sup> Rather than updating the corpus of the Article, I decided to include this postscript in order to evaluate the "natural experiment [that] test[s] the four species of presidential maladministration" during the early days of the Trump Administration.<sup>731</sup> This postscript is by no means meant to be exhaustive.

### A. Revisiting Reversals

During the first year of the Trump Administration, the Justice Department has reversed Obama-era litigating positions on voting rights, the use of consent decrees with police departments, affirmative action practices in higher education, the application of federal discrimination laws to the LGBT community, and

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727. Adrian Vermeule, *Two Futures for Administrative Law*, YALE J. REG. NOTICE & COMMENT (Nov. 30, 2016), <http://yalejreg.com/nc/two-futures-for-administrative-law-by-adrian-vermeule/>.

728. *Id.*

729. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 32 n.182 (2017) ("some anti-administrative scholars are now sounding alarms about burgeoning presidential power") (citing Josh Blackman, *Presidential Maladministration*, 2018 U. ILL. L. REV. 397 (on file with the Harvard Law School Library)).

730. Adam Liptak, *Trump's Legal U-Turns May Test Supreme Court's Patience*, N.Y. TIMES (Aug. 28, 2017), <https://nyti.ms/2vCu3BG> ("In a new law review article, Josh Blackman, a professor at South Texas College of Law, considered earlier changes in the government's legal positions, finding them 'increasingly problematic.' On the one hand, he wrote, elections have consequences. 'There is nothing nefarious when a new administration disagrees with a previous administration,' he wrote. 'Indeed, it is quite natural that presidents see things differently. The only question that remains is how should courts treat this reversal.' If two administrations manage to read the same federal statutes in opposite ways, he wrote, something may be amiss. 'Where an incoming administration reverses a previous administration's interpretation of statute simply because a new sheriff is in town,' he wrote, 'courts should verify if the statute bears such a fluid construction.'").

731. *Supra* Part IV.

the admissibility of transgender people in the military, among many other topics.<sup>732</sup> One of the clearest instances yet of presidential reversal came in *National Labor Relations Board v. Murphy Oil USA, Inc., et al.*<sup>733</sup> In the waning months of the Obama Administration, the Solicitor General's office urged the Supreme Court to review a decision that upheld an arbitration agreement, which barred employees from suing their employers.<sup>734</sup> However, less than a year later, the incumbent administration took the exact opposite position, and urged the Court to uphold the lower court's decision.<sup>735</sup> Acting Solicitor General Jeffrey B. Wall did not indulge the Court by attributing the change in position to "further reflection." Rather, the government's brief stated quite frankly that "[a]fter the change in administration, the office reconsidered the issue and has reached the opposite conclusion."<sup>736</sup> As a result, the National Labor Relations Board filed its own brief, adhering to the Obama Administration's position.<sup>737</sup> Two months later, Wall would explain another reversal in a case involving voting rights with the same language: "[a]fter this court's grant of review and the change in administrations the department reconsidered the question."<sup>738</sup> In that case, the NAACP Legal Defense and Educational Fund cited this Article for the proposition that the Supreme Court "should accord no weight to the [Trump] Department's interpretation *du jour* and should remain mindful of the Department's long-held previous construction . . ."<sup>739</sup> Naked, perhaps, but weightless, not quite.

Under the rubric advanced in Section III.A, "[t]here is nothing nefarious" about these reversals because in each case "the statute bears such a fluid construction."<sup>740</sup> Indeed, in several of these cases, the Trump Administration was returning to the interpretations that were adopted by previous administrations; that is, reversing a reversal. These earlier positions, which were adopted closer-in-time to the creation of the statutory regime, ought to be entitled to more, not less, deference.

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732. Charlie Savage, *In Shift, Justice Dept. Says Law Doesn't Bar Transgender Discrimination*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/politics/transgender-civil-rights-act-justice-department-sessions.html?partner=rss&emc=rss&referrer=https://www.nytimes.com/2017/07/26/us/politics/trump-transgender-military.html?action=click&contentCollection=Politics&module=RelatedCoverage&region=Marginalia&pgtype=article>.

733. 808 F.3d 1013 (5th Cir. 2015), *cert granted*, 2016 LEXIS 680 (U.S., Jan. 13, 2017) (No. 16-307).

734. Petition for Writ of Certiorari, *NLRB v. Murphy Oil USA, Inc., et al.*, 2016 LEXIS 680 (No. 16-307), <http://www.scotusblog.com/wp-content/uploads/2016/10/16-307-cert-petition.pdf>.

735. Brief for the United States as Amicus Curiae Supporting Respondents, *Murphy Oil*, 2016 LEXIS 680 (No. 16-307), [http://www.scotusblog.com/wp-content/uploads/2017/06/16-285\\_16-300\\_16-307\\_tsac\\_bsac\\_unitedstates.pdf](http://www.scotusblog.com/wp-content/uploads/2017/06/16-285_16-300_16-307_tsac_bsac_unitedstates.pdf).

736. *Id.* at 13.

737. Brief for Petitioner, *Murphy Oil*, 2016 LEXIS 680 (No. 16-307), <https://www.nlr.gov/case/10-CA-038804>.

738. Brief for the United States as Amicus Curiae Supporting Petitioner, *Husted v. A. Philip Randolph Inst.*, 2017 U.S. LEXIS 4398 (No. 16-980), <http://www.scotusblog.com/wp-content/uploads/2017/08/16-980-tsac-US.pdf>.

739. Brief for the NAACP Legal Defense And Educational Fund, Inc., and the Leadership Conference on Civil and Human Rights as Amici Curiae Supporting Respondents at 8, *Husted*, 2017 U.S. LEXIS 4398 (No. 16-980).

740. *Supra*, Section III.A.

*B. Discarding Discoveries*

Section III.B highlighted two instances in which the Obama Administration “locat[ed] . . . some new authority, jurisdiction, or discretion that was heretofore unknown”<sup>741</sup>: providing subsidized insurance to members of Congress and payment of cost-sharing subsidies to insurers. There has been little movement on the former matter, other than some advocacy from Senator Ron Johnson (R-WI).<sup>742</sup> There was a significant change on the latter matter: After continuing the Obama-era payment policy for nearly eight months, in October 2017, Attorney General Jeff Sessions announced that the subsidies would be halted.<sup>743</sup>

In a letter to the Departments of Health and Human Services and Treasury, the attorney general determined that the ACA “does not appropriate funds for CSR payments.”<sup>744</sup> He acknowledged that his predecessor had defended the payments, but “concluded that the best interpretation of the law is that the permanent appropriation” cannot be used to fund the CSRs.<sup>745</sup> The Holder Justice Department had read the statutory language to argue that the payments to customers and insurers “are essentially two parts of a single program.”<sup>746</sup> Sessions disagreed: “[t]he two programs are distinct.”<sup>747</sup> This situation is worlds away from President Nixon’s practice of impoundment, whereby he declined to spend money that had been appropriated, because he disagreed with Congress’s priorities—a practice that Congress subsequently prohibited.<sup>748</sup> Here, President Trump declined to spend money that was never appropriated in the first place. Due to this relinquishment of power, the Trump Administration has returned this important question to where it belongs: Congress. Shortly after this decision was announced, challenges were filed to require the government to continue making the CSR payments.<sup>749</sup> On December 15, the House of Representatives and the Department of Health and Human Services agreed to dismiss the litigation.<sup>750</sup>

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741. *Supra*, Section III.B.

742. Tom Howell, Jr., *Sen. Ron Johnson threatens to subpoena OPM over Obamacare ‘exemption,’* WASH. TIMES (Oct. 5, 2017), <https://www.washingtontimes.com/news/2017/oct/5/ron-johnson-threatens-subpoena-opm-over-obamacare/>.

743. Letter from Jeff Sessions, Attorney Gen. of the U.S., to Steve Mnuchin, Sec’y of the Treasury, and Don Wright, acting Sec’y of the U.S. Dep’t of Health & Human Servs. (Oct. 11, 2017), <https://www.hhs.gov/sites/default/files/csr-payment-memo.pdf>.

744. *Id.* at 1.

745. *Id.*

746. *Id.* at 2.

747. *Id.*

748. *Train v. City of New York*, 420 U.S. 35 (1975).

749. Dan Mangan, *States to sue to block Trump cutoff of Obamacare money, as higher-income customers face biggest hit*, CNBC (Oct. 13, 2017), <https://www.cnbc.com/2017/10/13/states-to-sue-to-block-trump-cutoff-of-obamacare-money.html>.

750. See Josh Blackman, *Settlement Reached in House of Representatives Cost-Sharing Reduction (CSR) Subsidies Suit*, JOSH BLACKMAN’S BLOG (Dec. 15, 2017), <https://joshblackman.com/blog/2017/12/15/settlement-reached-in-house-of-representatives-cost-sharing-reduction-csr-subsidies-suit/>.

### C. Reinforcing Enforcement

Perhaps the most avulsive changes from the 44th to the 45th presidents concern nonenforcement. This species of maladministration, I wrote, occurs when “the President abstains from exercising an old power that was heretofore established.”<sup>751</sup> Section III.C focused on the Obama Administration’s nonenforcement of the Affordable Care Act’s individual mandate, and the immigration laws concerning the Dreamers and parents of U.S. citizens who lack lawful presence. With respect to healthcare reform, in light of Congress’s failure to repeal the Obama-era law, there have been reports that the Trump Administration is looking to *expand* the hardship exemption to the individual mandate.<sup>752</sup> If this comes to pass, it would be a regrettable violation of the law. (In December 2017, as part of the tax reform bill, Congress reduced the individual mandate’s penalty to \$0 starting in 2018; thus, any executive actions would be short-lived.)<sup>753</sup> With respect to immigration, however, President Trump has made good on his promises.

Following the inauguration, the Trump Administration rescinded DAPA—a policy that had never gone into effect<sup>754</sup>—but, to the surprise of many, retained DACA.<sup>755</sup> Texas, along with some several other states, threatened to sue the Trump Administration if it continued to grant new licenses under DACA.<sup>756</sup> In response to this ultimatum, Sessions advised the Department of Homeland Security to wind down DACA.<sup>757</sup> The attorney general determined that the policy was implemented without proper statutory authority and that this “open-ended circumvention of immigration laws was an unconstitutional exercise of authority by the Executive Branch.”<sup>758</sup> He reaffirmed his “duty to defend the Constitution and to faithfully execute the laws passed by Congress.”<sup>759</sup> Sessions added that the “proper enforcement of our immigration laws is, as President Trump consistently said, critical to the national interest and the restoration of the rule of

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751. *Supra* Section III.C.

752. Philip Klein, Robert King & Kimberly Leonard, *Daily on Healthcare: Senator claims Trump preparing to cripple individual mandate, but WH says it wants legislative solution*, WASH. EXAMINER (Nov. 6, 2017), <http://www.washingtonexaminer.com/daily-on-healthcare-senator-claims-trump-preparing-to-cripple-individual-mandate-but-wh-says-it-wants-legislative-solution/article/2176972>.

753. Cristiano Lima, *Trump Boasts of Individual Mandate Repeal in GOP Tax Bill*, POLITICO (Dec. 20, 2017, 12:45 PM), <https://www.politico.com/story/2017/12/20/trump-individual-mandate-repeal-tax-bill-308286>.

754. *Rescission of Memorandum Providing for Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”)*, HOMELAND SECURITY (June 15, 2017), <https://www.dhs.gov/news/2017/06/15/rescission-memorandum-providing-deferred-action-parents-americans-and-lawful>.

755. *See id.* (“The June 15, 2012 memorandum that created the Deferred Action for Childhood Arrivals (DACA) program will remain in effect.”).

756. *See* Julian Aguilar, *Texas leads 10 states in urging Trump to end Obama-era immigration program*, TEX. TRIB. (June 29, 2017), <https://www.texastribune.org/2017/06/29/texas-leads-10-states-urging-trump-end-daca/>.

757. *Attorney General Sessions Delivers Remarks on DACA*, U.S. DEP’T OF JUSTICE (Sept. 5, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca>.

758. *See* Josh Blackman, *Jeff Sessions Restores the Rule of Law*, NAT’L REV. (Oct. 16, 2017), <http://www.nationalreview.com/article/452725/obamacare-immigration-trump-limits-his-own-power>.

759. *Id.*

law in our country.”<sup>760</sup> On this front at least, the Trump Administration has halted nonenforcement of the immigration laws.

#### D. *Intruding Further*

Section III.D focused on President Obama’s intrusion into the Federal Communication Commission’s deliberations concerning net neutrality. While challenges to the “Open Internet” order were pending, the composition of the FCC shifted. Ajit Pai, who had dissented from the original regulation, was designated as Chairman in January 2017.<sup>761</sup> Joined by two new commissioners appointed by President Trump,<sup>762</sup> the agency now had the votes to roll back net neutrality.<sup>763</sup> In announcing the new proposal, Pai noted that “President Obama publicly pressured” the FCC “after a poor midterm election,” and “the FCC followed President Obama’s instructions on a party-line vote.”<sup>764</sup>

There is one possible presidential intrusion on the horizon that warrants study: can the executive branch require independent agencies to submit regulations for approval before they can be published in the Federal Register? Pre-approval is a remedy far short of removal from office,<sup>765</sup> but in theory, it could have a similar effect: a policy to reject *all* submissions, simply for policy disagreements, or for no reason at all, could effectively banish an agency to regulatory limbo.

As it stands now, Executive Order 12,866, which establishes the Office of Information and Regulatory Affairs’ centralized review process, expressly excludes “independent regulatory agencies.”<sup>766</sup> When the Reagan Administration crafted Executive Order 12,866’s predecessor, however, Executive Order 12,291, it did so for policy, not for constitutional reasons.<sup>767</sup> There have been reports that the Trump Administration is considering placing the regulations of

760. *Id.*

761. See Jon Brodtkin, *Ajit Pai gets new term on FCC despite protest of anti-net neutrality plan*, ARS TECHNICA (Oct. 2, 2017), <https://arstechnica.com/tech-policy/2017/10/ajit-pai-gets-new-term-on-fcc-despite-protest-of-anti-net-neutrality-plan/>.

762. See Ali Breland, *Senate confirms two new FCC commissioners*, HILL (Aug. 3, 2017), <http://thehill.com/policy/technology/345209-senate-confirms-two-new-fcc-commissioners>.

763. Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html>.

764. Ajit Pai, *How the FCC Can Save the Open Internet*, WALL ST. J. (Nov. 21, 2017), <https://www.wsj.com/articles/how-the-fcc-can-save-the-open-internet-1511281099>.

765. *Cf. Humphrey’s Executor v. United States*, 295 U.S. 602, 628–29 (1935) (holding that the “illimitable power of removal is not possessed by the President” with respect to commissioners of independent agencies).

766. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), [https://www.reginfo.gov/public/jsp/Utilities/EO\\_12866.pdf](https://www.reginfo.gov/public/jsp/Utilities/EO_12866.pdf).

767. “Role of OMB in Regulation,” H.R. Rep. No. 70, 97th Cong., 1st. Sess. 152 (1981) at 94, [http://njlw.rutgers.edu/collections/gdoc/hearings/8/82601518/82601518\\_1.pdf](http://njlw.rutgers.edu/collections/gdoc/hearings/8/82601518/82601518_1.pdf) (quoting remarks of Boyden Gray remarks at the Chamber of Commerce) (“The EO, by its terms, does not cover the independent agencies. This is not so much that we thought we lacked certain legal authority to do certain things, since I think we could have extended the EO and might still in the future. We chose not to do it really because of policy reasons that we had our plate more than full with the Executive Branch Agencies which do impose by far the greatest percentage of capital costs burdens that we think were issues during the campaign. We just didn’t want to spread ourselves too thin. If we can get the main regulatory problems under control, we’ll actually focus at that point more on the independents, but we’ll wait and see how much progress we make with the Executive Branch.”).



independent agencies under OIRA's purview.<sup>768</sup> Though extending executive-branch review of the regulations of independent agencies has been supported by the American Bar Association's Administrative Law Section as well as the Administrative Conference of the United States,<sup>769</sup> this decision could be challenged under the separation of powers as an unlawful presidential intrusion.

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In due time, I hope to revisit the Trump Administration's maladministration in far more depth.

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768. Christopher DeMuth, *Trump vs. the Deep Regulatory State*, WALL ST. J. (Nov. 17, 2017), <http://on.wsj.com/2B8KXM7> (the President "could apply White House regulatory policies and budgeting to the 'independent agencies' such as the FCC and Securities and Exchange Commission."); see Josh Blackman, *Is Trump Restoring Separation of Powers?*, NAT'L REV. (Nov. 20, 2017), <http://www.nationalreview.com/article/453896/donald-trump-separation-powers-solid-job> ("Neomi Rao, who heads OIRA, suggested during the Federalist Society convention that such a review could be implemented for independent agencies as well.")

769. See Letter from Thomas M. Susman, Dir., Governmental Affairs Office, Am. Bar Ass'n, to Members of the Senate Comm. on Homeland Sec. and Governmental Affairs (July 23, 2015), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015july23\\_independentagencyreg\\_l.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015july23_independentagencyreg_l.authcheckdam.pdf) ("As a 1986 ABA resolution explained, '[t]he Constitutional principles that justify presidential involvement in rule-making activities are applicable to both the executive and the independent agencies and, thus . . . executive orders [governing that involvement] should be extended to the independent agencies.'"); ACUS Recommendation No. 88-9, "Presidential Review of Agency Rulemaking" (Dec. 8, 1988), <https://www.acus.gov/recommendation/presidential-review-agency-rulemaking> ("As a matter of principle, presidential review of rulemaking should apply to independent regulatory agencies to the same extent it applies to the rulemaking of Executive Branch departments and other agencies.").

