Presidential Administration Under Trump

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I. Introduction

Though the Presidency has been a perennial topic in the legal literature, Justice Elena Kagan, in her earlier career as an academic, penned an enormously influential 2001 article about the increasingly dominant role of the President in regulation, at the expense of the autonomy of administrative agencies.[2] The article's thesis, simply stated, was that "[w]e live in an era of presidential administration.", by which she meant that the White House rather than administrative agencies had become the dominant force in controlling the direction of federal regulation.[3] Kagan's article did not simply document the emergence of presidential administration; it also celebrated this development. She argued that "in comparison with other forms of control, the new presidentialization of administration renders the bureaucratic sphere more transparent and responsive to the public, while also better promoting important kinds of regulatory competence and dynamism."[4]

Kagan admitted that presidential administration posed risks, but she argued that those risks were manageable. In turning to possible critiques of her position, Kagan contended that any tendency by presidents to push past the edges of legality can be combatted by the courts.[5] She also argued that the risk of displacing agency

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[1] Sho Sato Professor of Law at the University of California, Berkeley. Particular thanks are due to

[2] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001). According to Westlaw, the article had been cited over 800 times in law reviews as of the end of July 2017. Some of the important contributions to the literature on this issue include Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); Sidney A. Shapiro and Richard Murphy, *Constraining White House Political Control of Agency Rulemaking Through the Duty of Reasoned Explanation*, 48 UC DAVIS L. REV. 1457 (2015); Mark Seidenfeld, *The Irrelevance of Politics to Arbitrary and Capricious Review*," 90 WASH. U . L. REV. 141(2012); Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 19 FORDHAM L. REV. 2487 (2011); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 1 (2009) [hereinafter *Place for Politics*]; Kevin Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006). Perhaps it is well to state at the outset that my description of Kagan's views is based on this article alone, rather than any assumption one way or another about how those views may have evolved in the meantime.

[3] Kagan, supra note 2, at 2246.

[4] Id. at 2252.

[5] Kagan, supra note 2, at 2349-50. Bruce Ackerman has emphasized the risk that the President "will be tempted to achieve his objectives by politicizing the administration of whatever-laws-happen-to-be-on-the-books." Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 712 (2000). Ackerman continues, "To be sure, an impartial reading of these statutes might imply that his initiative falls far beyond the limits of legal authority; but with his political partisans in charge of the

expertise was overblown by critics, although she admitted this as a possibility.[6] Still, Kagan conceded, "[f]uture developments in the relationship between the President and the agencies may suggest different judicial responses; the practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions."[7]

Although the Trump Administration is still less than a year old, it already seems to provide just the kind of evidence of "evolution" that, in Kagan's language, raises new issues and casts doubt on old conclusions. In terms of his role in the administrative state, President Trump has used many of the same tools as Bill Clinton, Kagan's primary exemplar, in order to control the administrative state and stamp its output with his "brand." It is too soon to assess the long-term implications of Trump's election for American politics, and we cannot be sure whether he is part of a trend or a political outlier.[8] But Trump's approach to governance has alarmed legal scholars across the political spectrum, not just liberals who are predictably dismayed by his policies.[9]

Prominent conservative legal scholars have questioned Trump's ability to lead the administrative state and his respect for the rule of law. For instance, Jack Goldsmith called on courts to relax their usual presumption in favor of the legality of administrative actions given what he called Trump's instability.[10] Only a month

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administration, why shouldn't the president encourage them to bend the law to fulfill the administration's program?" Id.

[6] Id. at 2352-2355.

[7] Kagan, supra note 2, at 2385.

[8] For discussions by legal academics of the larger implications of the election, see Eric Posner, *Can It Happen Here? Donald Trump and the Paradox of Populist Government* (June 2017), available at https://ssrn.com/abstract=2893251; Scott Dodson, Dahlia Lithwick, Bertrall Ross, and Joan Williams, *The 2016 Presidential Election: The Next Four Years and Beyond*, *44* HASTINGS CONST. L.Q. 256 (2017)(panel discussion); David Orenlicher, *Political Dysfunction and the Election of Donald Trump: Problems of the U.S. Constitution's Presidency*, 50 IND. L. REV. 247 (2016).

[9] For instance, Professor Laurence Tribe has called for Trump's impeachment. Laurence, J. Tribe, *Trump Must be Impeached. Here's Why*, WASH. POST (June 17, 2017), available at https://www.washingtonpost.com/opinions/trump-must-be-impeached-heres-why/2017/05/13/82ce2ea4-374d-11e7-b4ee-434b6d506b37_story.html?utm_term=.27d971a4a869.

[10] Goldsmith took to social media to express his view of the President:

> Given POTUS's instability, it is not just courts that have reason to relax the presumption of regularity for this Prez. ... We all have reason to do so about everything the Executive branch does that touches, however lightly, the President. ...One thing DT [Donald Trump] behavior entails...is many losses in court and not just on the immigration EOs [Executive Orders]....Everything else Executive would normally win—reversing Clean Power Plan, terminating treaty, new regs, etc.—will be much, much harder.

Josh Gerstein, *Trump's Tweets Prompt Backlash from GOP Lawyers,* Politico (June 5, 2017), available at http://www.politico.com/story/2017/06/05/trump-tweets-republican-lawyers-backlash-239148.

after Trump took office, Eric Posner questioned whether "Trump can last even one term unless his top advisers take away his phone, lock him in a closet, and let him out only for carefully scripted ceremonies which are taped so that they can be edited before broadcast to the public."[11] Posner flagged Trump's inability to receive the trust or support of the federal bureaucracy as a particular source of weakness.[12] Shortly before the 2016 election, a group containing many of the most prominent conservative law professors signed an open letter accusing Trump of being "indifferent or hostile to the Constitution's basic features—including a government of limited powers, an independent judiciary, religious liberty, freedom of speech, and due process of law."[13] Michael McConnell said that Trump's attacks on federal judges regarding pending cases were "shredding longstanding norms of etiquette and interbranch comity" and were "extremely self-defeating and self-destructive" because they would result in more rigorous scrutiny of his actions by federal judges.[14]

As the next section of this Essay describes, the Trump Administration deviates from Kagan's expectations for presidential administration in some disturbing ways. Rather than providing a coherent, uniform approach to policy, the White House is riven by internal factions that independently seek public support for their views. We will also see that commentators have a firm basis for their concerns about the Administration's adherence to the rule of law. And rather than deferring to agency experts, the Administration has often cut them out of the loop and has shown itself hostile in important ways to traditional forms of expertise. Putting entirely to the side whether one agrees or disagrees with the President's policy decisions, these process issues cannot but raise doubts about Kagan's normative case for Presidential Administration.

Despite the temptation to view the Trump Administration as an outlier, in important respects, it is continuing the trend toward centralizing regulatory

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[11] Eric Posner, *Is Trump Finished?* (Feb. 17, 2017), available at http://ericposner.com/is-trump-finished/.

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> Trump doesn't seem to understand that a successful president needs the support of the bureaucracy; he can't boss agency officials around like Trump Organization employees, but must act through them. If he attacks them for political reasons, or is incapable of telling the truth, they will not trust him. If they don't trust him or if they fear him, they will not do his bidding. They may even try to undermine him. In fact, they already have.

Id.

[13] Jonathan Adler et al., *2016 Statement Originalists Against Trump*, available at https://originalistsagainsttrump.wordpress.com/2016-statement/. Among others, the signatories included Richard Epstein, long a conservative icon, and Steven Calabresi, co-founder of the Federalist Society.

[14] Julie Hirschfeld David, *Supreme Court Nominee Calls Trump's Attacks on Judiciary 'Demoralizing'*, NY TIMES (Feb. 8, 2017), available at https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html.

authority while echoing or amplifying types of behavior found to a lesser extent in earlier Administrations. Under George W. Bush, the White House tightly controlled regulatory decisions.[15] Writing before Trump took office, Kathryn Watts cited Barack Obama as having "elevated White House control over agencies' regulatory activity to its highest level ever."[16] Obama, like Trump, exploited the potential of on-line media to publicize his regulatory directives – in Obama's case through use of the White House website, on-site videos, blogs, and social media including Twitter.[17] On occasion, Obama ran roughshod over the views of agencies' scientific experts,[18] although this seems to have been a more pervasive issue in the Bush Administration.[19] Bush and Obama both exploited the system for White House regulatory review first established by Reagan via the Office of Information and Regulatory Affairs (OIRA).[20] It remains to be seen how much the Trump Administration will rely on this method of agency control, but Trump issued an executive order early in his Administration imposing important new restrictions on agency rulemaking and directing OIRA to enforce those restrictions. Thus, there are important commonalities between Trump and his predecessors that make it harder to dismiss his relevance to broader debates about presidential power.

This is not to say that observers are wrong to consider Trump's approach to the presidency as exceptional. Although borrowing governance methods from his predecessors, he may be going to greater extremes in the frequency and degree of his reliance on those methods, so that what was previously exceptional seems now to be a more central part of governance. But nevertheless, there are some clear continuities with his predecessors, in method if not necessary in policy. The policies themselves are not our present concern, but what *is* of concern is the way those policies are formulated and implemented.

In Part II of the essay, I will describe the current operation of the Trump White House, which I believe is likely to anticipate his future governing style. It is admittedly still early in Trump's term, but he seems unlikely to radically change his

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[15] Watts, *Presidential Control*, supra note 2, at 692-698.

[16] Id. at 698.

[17] Id. at 704.

[18] Id. at 706.

[19] Id. at 696-698.

[20] Id. at 693-696, 698-700. For more on scientific integrity issues under these administrations, see Heidi Kitrosser, *Scientific Integrity: The Perils and Promise of White House Administration*, 79 FORDHAM L. REV. 2395 (2011). Another important form of presidential control is provided by OMB's role in the budget process, the theme of Eloise Pasachoff, *The President's Budget as a Source of Agency Policy*, 125 YALE L.J. 2182, 2207 (2016). It is unclear how effective that mechanism will be under Trump, given the negative congressional response to his first budget request even by many members of his own party. See Bob Ryab, *Trump's Budget is Facing Massive Blowback in Congress — and Republicans Are Some of the Loudest Complainers*, BUSINESS INSIDER (May 23, 2017), available at http://www.businessinsider.com/trump-2018-budget-white-house-republicans-2017-5. But that topic lies outside the scope of this essay.

current approach to governance, particularly because his approach to being Chief Executive mirrors his long-established habits as a business executive.[21]

Part III then turns to some on-going disputes about presidential power in administrative law, such as whether the president has the power to displace agency heads as decision-makers or only to remove them if they fail to follow his instructions. Experience thus far with the Trump Administration undercuts Kagan's positions. In particular, I argue, that experience should lead us to reject her call for a more expansive view of the president's power to issue legally binding dictates to agencies, as well as her argument that presidential involvement in an agency action should lead to greater judicial deference. On the contrary, the need for a check against White House disregard for the rule of law and expert knowledge should lead to a presumption that the president does not have this type of directive power over agencies unless Congress specifically grants that power. While presidential efforts to influence an agency should be grounds for overturning an agency action only in extreme cases, it may sometimes warrant a court in taking a harder look at the legal and factual foundations of that action.

My arguments are designed to ensure that the voice of agency professionals is head and plays a central role in agency decisions. The question is one of balance. Under recent presidents (not only Trump), the balance of power has shifted away from experts within agencies to political actors, often in the White House.[22] In my view, the shift has gone too far. One of the abiding themes of administrative law is the tension between expertise (largely housed in the bureaucracy) and political accountability (centered primarily in the White House). It is worth considering whether the balance has shifted too far in the direction of politics rather than expertise. Yet expertise is not all that is at stake: excessive centralization may also pose risks to the rule of law, particularly under current circumstances.

II. Organizational Structure and Behavior

Kagan's argument relied importantly on assumptions about how the president, the White House, and agencies function and interact. Although President Trump has only been in office for a limited time, it is not too early to begin drawing some tentative conclusions about how his Administration makes decisions. One reason to

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[21] One point of divergence should be noted. Due to his private sector activities and some post-election actions, it was anticipated that one important strategy for Trump would be negotiating deals with firms to take desired actions, rather than using more formal legal methods of influencing their behavior. See Steven Davidoff Solomon and David Zaring, *The Dealmaking State: Executive Power in the Trump Administration* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921407. Thus far, however, this has not become an important part of Trump's presidency.

[22] For a historical account of how the balance between expertise and politics in the rulemaking process evolved in the direction of politics prior to the Clinton Presidency, the subject of Kagan's analysis, see Peter L. Strauss, *From Expertise to Politics: the Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745 (1996). Further developments under presidents succeeding Clinton (George W. Bush, Barack H. Obama, and Donald J. Trump) are covered in later sections of the present essay.

think that the months in office will turn out to be representative is that Trump is continuing methods of management that he used for decades in the business world. We begin with a discussion of those established patterns of behavior.

A. Trump's Private Sector Background

To understand how Donald Trump has approached the office of the presidency, it is important to understand his experience in business. Unlike publicly held businesses, which are subject to a web of regulations regarding their governance and disclosures, Trump was the head of a family business with no public accountability.[23] The one exception was Trump Hotels and Casino Resorts, a public venture that collapsed.[24]

Trump's business success was largely based on creating a brand around his own lifestyle and marketing the brand aggressively. As one commentator explained, "After going through bankruptcies and the ups and downs of the real estate market, he has learned to reduce his risk. He puts his name and his image to work while keeping the costs and exposure low."[25] Thus, properties license his name, so that "[h]e gets a fee for lending out his name, makes sure there's quality control and gets great marketing out of having another bit of Trump-branded property in the market place."[26]

This low-risk strategy was a result of hard experience. Early in his career, he experienced large losses in three real estate partnerships financed by Chase. He then moved into casinos with the Trump Plaza Corporation, developing the property in return for financing and casino management by Harrah's.[27] Building on the publicity from this venture, he purchased a nearly complete Hilton Atlantic City Hotel, then acquired the Taj Mahal using junk bonds.[28] At around the same time, he acquired Eastern Airline's northeast shuttle, renaming it the Trump Shuttle.[29] By 1990, his ventures were struggling to no avail, but he was able to secure an

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[23] Bert Spector, *Trump Wasn't a Real CEO. No Wonder His White House is Disorganized*, WASH. POST (Feb. 21, 2017), available at https://www.washingtonpost.com/posteverything/wp/2017/02/21/trump-wasnt-a-real-ceo-no-wonder-his-white-house-is-disorganized/?utm_term=.3801a27755b6.

[24] *Id.*

[25] Shaun Rein, *Genuine Business Lessons From Donald Trump*, FORBES (May 4, 2009), available at https://www.forbes.com/2009/05/04/donald-trump-marketing-leadership-managing-image.html.

[26] Id.

[27] Kurt Eichenwald, *Donald Trump's Many Business Failures, Explained*, NEWSWEEK (August 12, 2016), available at http://www.newsweek.com/2016/08/12/donald-trumps-business-failures-election-2016-486091.html.

[28] Id.

[29] Id.

additional bank loan.[30] By 2009, Trump Entertainment Resorts filed for bankruptcy four days after Trump resigned from the board, owing $3.4 billion.[31]

Trump's wealth, estimated by *Fortune* at $3.72 billion, is almost entirely in the form of real estate, including office buildings, golf courses and clubs, and apartment buildings.[32] *Fortune* also characterized him as highly litigious and prone to take on debt recklessly.[33] According to a CNN report, his real estate enterprises include over 560 entities in which he has an ownership share.[34] For instance, "Trump's stake in the 1200 Avenue of the Americas commercial property in New York City. . . is held within at least a dozen companies, including three limited liability companies, three corporations, and six limited partnerships."[35] Of these hundreds of entities, many are shell companies owning shares in other entities rather than conducting business operations.[36]

About half of Trump's wealth consists of investments in four major buildings in New York and San Francisco.[37] But marketing the Trump name now seems to be much of the business focus, as noted above. A recent press account lists over thirty such licensing deals in countries around the world, about half in the United States.[38]

Because Trump's business empire involves real estate investments combined with licensing, it does not require the type of organization that would be needed to manage major properties or construction projects. The president of his shuttle airline said that "[i]t surprised me how much of a family-type organization it was, instead of a business kind of orientation where there is a structure and there is a chain of command and there is a delegation of authority and responsibility."[39] Trump's principal management responsibility was "a core group of barely more than a dozen executives housed on the 26th floor of Trump Tower."[40] Based on

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[30] Id.

[31] Id.

[32] Shawn Tully and Roger Parloff, *Business the Trump Way*, FORTUNE (April 21, 2016).

[33] Id.

[34] Drew Griffin, Scott Bronstein, and Curt Devine, *Trump's Tangled Web of Businesses*, CNN (Jan. 10, 2017), available at http://money.cnn.com/2017/01/10/news/trump-business-conflicts/.

[35] Id.

[36] CBS News, *A Guide to Donald Trump's Business Empire* (Dec. 13, 2016), available at http://www.cbsnews.com/news/donald-trump-business-empire/.

[37] Id. [CBS News *Guide*].

[38] Aaron Williams and Anu Narayanswamy, *How Trump Has Made Millions by Selling His Name*, WASH. POST (Jan. 25, 2017), available at https://www.washingtonpost.com/graphics/world/trump-worldwide-licensing/.

[39] Michael Kruse, *'He's a Performance Artist Pretending to be a Great Manager*', POLITICO (Feb. 28, 2017), available at http://www.politico.com/magazine/story/2017/02/hes-a-performance-artist-pretending-to-be-a-great-manager-214836.

[40] Id.

extensive interviews, *Politico* described the views of business associates and biographers:

> In recent interviews, they recounted a shrewd, slipshod, charming, vengeful, thin-skinned, belligerent, hard-charging manager who was an impulsive hirer and a reluctant firer and surrounded himself with a small cadre of ardent loyalists; who solicited their advice but almost always ultimately went with his gut and did what he wanted. . . ; and who fostered a frenetic, internally competitive, around-the-clock, stressful, wearying work environment in which he was a demanding, disorienting mixture of hands-on and hands-off—a hesitant delegator and an intermittent micromanager who favored fast-twitch wins over long-term follow-through, promotion over process and intuition over deliberation.[41]

As we will see, many of these management practices would later carry over into Trump's early term as President. Trump's approach to the presidency may also have been guided by his television experience. As one journalist put it, "What Washington has been trained to see as disorder . . . is actually a long-running theatrical event. The Trump Show, a time-tested method by which the star builds excitement, demands attention and creates soap-operatic story lines that at least superficially seem like success."[42] Trump has described how the "key to his business success . . . was to solidify in the public's mind that 'Trump' means ambition, wealth and a distinctly personal expression of success."[43]

Trump's business was notably litigious. A newspaper was able to identify over four thousand lawsuits involving Trump or his businesses.[44] After examining the records, the newspaper concluded that "Trump frequently responds to even small disputes with overwhelming legal force, not hesitating to use his tremendous wealth and legal firepower against adversaries with limited resources."[45] Perhaps the most notable was a lawsuit accusing Trump and others of fraud in connection with Trump University, which resulted in a $25 million settlement.[46] Trump had

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[41] Id.

[42] Marc Fisher, *President Trump Wants to Put on a Show. Governing Matters Less* (Feb. 24, 2017), available at https://www.washingtonpost.com/posteverything/wp/2017/02/24/president-trump-wants-to-put-on-a-show-governing-matters-less/?utm_term=.ff5a073f6628.

[43] Id.

[44] Nick Penzenstadler and John Kelly, *How 75 Pending Lawsuits Could Distract a Donald Trump Presidency: Two Weeks Before Election Day, Dozens of the 4,000-Plus Lawsuits Involving Trump and His Businesses Remain Open*, USA Today (Oct. 25, 2016), available at https://www.usatoday.com/story/news/politics/elections/2016/10/25/pending-lawsuits-donald-trump-presidency/92666382/.

[45] Id.

[46] Steve Eder and Jennifer Medina, *Trump University Suit Settlement Approved by Judge,* NY TIMES (March 31, 2017), available at https://www.nytimes.com/2017/03/31/us/trump-university-settlement.html?_r=0.

accused the federal judge overseeing the case with being biased against him because of the judge's Mexican heritage, given Trump's adversarial stance toward Mexico.[47]

B. The White House: Internal Operations

The Trump transition was indicative of the initial direction of the Administration. The transition team had compiled thirty large binders of information and recommendations, with detailed plans and timetables.[48] But soon after the election the transition chair, Governor Chris Christie, was replaced by Vice President Pence, a decision prompted by Jared Kushner, the president's son-in-law.[49] Trump ignored some recommendations of the transition team and ignored the timetable, eliminating time for vetting nominees.[50]

Within a month of Trump's inauguration, observers were already commenting on his unorthodox approach to managing the White House in what commentator called a great natural experiment in public administration.[51] One distinctive and continuing aspect of the Trump White House has been an unusual propensity toward leaks. This was also noted very early in Trump's term.[52] According to reports, the "breadth of the leaks has surprised – and of course, delighted – journalists," including tidbits such as transcripts of presidential phone calls to foreign leaders.[53] Some spoke of competing power centers within the White House,[54] and management experts were concerned about lack of consultation and suppression of dissent.[55] Insiders also complained about being kept in the dark about important decisions, and some advisors recommended monitoring of staff

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[47] Id.

[48] Dan Balz, *'It Went Off the Rails Almost Immediately': How Trump's Messy Transition Led to a Chaotic Presidency*, Wash. Post. (April 4, 2017), available at https://www.washingtonpost.com/politics/it-went-off-the-rails-almost-immediately-how-trumps-messy-transition-led-to-a-chaotic-presidency/2017/04/03/170ec2e8-0a96-11e7-b77c-0047d15a24e0_story.html?utm_term=.a9784deae107.

[49] Id.

[50] Id.

[51] See Daniel W. Drezner, *The First Great Natural Experiment of the Trump Administration*, WASH. POST. (Jan. 19, 2017), available at https://www.washingtonpost.com/posteverything/wp/2017/01/19/the-first-great-natural-experiment-of-the-trump-administration/?utm_term=.d5098659a077.

[52] Paul Frahi, *The Trump Administration Has Sprung a Leak. Many of Them, In Fact.*, WASH. POST., available at https://www.washingtonpost.com/lifestyle/style/the-trump-administration-has-sprung-a-leak-many-of-them-in-fact/2017/02/05/a13fad24-ebe2-11e6-b4ff-ac2cf509efe5_story.html?utm_term=.b3683f6b0422.

[53] Id.

[54] Id.

[55] James B. Stewart, *Case Study in Chaos: How Management Experts Grade a Trump White House*, WASH. POST (Feb. 3, 2017), available in https://www.nytimes.com/2017/02/02/business/donald-trump-management-style.html?_r=0.

cellphones and emails for leaks.[56] Other observers noted Trump's tendency to complain to others about the actions of senior administration officials: "Trump seems to keep a running list of whom he likes best—and least—among his top advisors, constantly updating the rankings . . . And, most strange of all, Trump seems entirely comfortable sharing that list with anyone."[57]

By February 10, less than a month after his inauguration, there were reports that Trump was finding the transition from business owner to Bureaucrat-in-Chief a difficult one.[58] Reporters – admittedly, perhaps, not disposed in his favor, said that interviewees "paint a picture of a powder keg of a workplace where job duties are unclear, morale among some is low, factionalism is rampant and exhaustion is running high."[59]

In the first six months, Trump eschewed the "strong chief-of-staff" model favored by predecessors[60] in favor of competing centers of influences. This has led to a tangle of lines of communication, with no clear connection to bureaucracy below the cabinet level.[61] Most presidents in the past fifty years have favored the use of a strong chief of staff to help control the volume of incoming information, scrutinize its reliability, when necessary tell the president he is wrong, and ensure that presidential decisions are effectively implemented and communicated by

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[56] David E. Sanger, Eric Schmitt, and Peter Baker, *Turmoil at the National Security Council, From the Top Down,* NY TIMES (Feb. 12, 2017), available at https://nyti.ms/214OBBM.

[57] Chris Cillizza, *We've Never Seen Anything Like Trump's Rough Treatment of His White House Staff*, WASH. POST. (Feb. 13, 2017), available at https://www.washingtonpost.com/news/the-fix/wp/2017/02/13/weve-never-seen-anything-like-donald-trumps-treatment-of-his-white-house-staff/?utm_term=.e48f9bcf5b27.

[58] Alex Isenstadt, Kenneth P. Vogel, and Josh Dawsey, *Scale of Government*, POLITICO (Feb. 10, 2017), http://www.politico.com/story/2017/02/donald-trump-challenges-governing-presidency-234879.

[59] Id. [in a separate section authored by Josh Gerstein].

[60] This model seems to have dated back to Robert Halderman in the Nixon Administration, but the most successful modern practitioner may have been James Baker under Reagan. See Chris Whipple, THE GATEKEEPERS: HOW THE WHITE HOUSE CHIEFS OF STAFF DEFINE EVERY PRESIDENCY 13, 23, 87, 89-90, 95-102 (2017).

[61] As one journalist with three decades of experience put it,

> A table of organization of Trump's executive branch would, as always, start with a box at the top representing the president. Beneath it would be a series of boxes — White House staffers, Cabinet officers, subcabinet officials and the like. Many of those boxes would be connected by intersecting lines, save for one. No solid line would connect the president to the rest of the government, only a dotted line or no line at all.

Dan Belz, *A President Divorced from the Executive Branch He Oversees*, WASH. POST (June 7, 2017), available at https://www.washingtonpost.com/politics/a-president-divorced-from-the-executive-branch-he-oversees/2017/06/07/cb4402cc-4ba1-11e7-bc1b-fddbd8359dee_story.html?utm_term=.e304f7809b63. The National Security Advisor has reportedly experienced similar problems in serving as a single point of access to the President. Eli Lake, *Trump's 'Axis of Adults' Is Breaking Apart*, BLOOMBERG NEWS (July 22, 2017), available at https://www.bloomberg.com/view/articles/2017-07-21/trump-s-axis-of-adults-is-breaking-apart

staff.[62] The main exception was Jimmy Carter, and his effectiveness as president suffered as a result.[63]

The ouster of Reince Priebus and his replacement with John Kelly in late July may be an attempt to impose order on the tumultuous White House.[64] Attempting to play the role of a strong chief of staff is likely to be a difficult task in the Trump White House, because of Trump's use of social media and the impossibility of limiting access to him by family members such as Ivanka Trump and her husband Jared Kushner, both of whom are in the White House. Kelly's appointment was paired with the appointment of Anthony Scaramucci as communications director a few days earlier. Scaramucci had promptly attacked Priebus and Bannon in a profanity-laced phone call to a reporter, in which he said he was going to have the FBI launch an investigation into a "leak" that turned out to involve publicly available information.[65] In turn, Kelly almost immediately forced Scaramucci out,[66] and took strong steps to assert control over staff.[67]

There are several significant players within the White House. Jared Kushner, the President's son-in-law, has considerable influence. Steve Bannon and his supporters are deeply at odds with Kushner and the "New York Moderates."[68] Aligned with Kushner is Gary Cohn, head of the National Economic Council, who was

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[62] Id. at.

[63] Id. at 112-122,

[64] Peter Baker and Maggie Haberman, *Reince Priebus Is Ousted Amid Stormy Days for White House*, NY TIMES (July 29, 2017), available at https://www.nytimes.com/2017/07/28/us/politics/reince-priebus-white-house-trump.html?emc=edit_th_20170729&nl=todaysheadlines&nlid=15539613&_r=0.

[65] Peter Baker and Maggie Haberman, *Anthony Scaramucci's Uncensored Rant: Foul Words and Threats to Have Priebus Fired*, NY TIMES (July 27, 2017), available at https://www.nytimes.com/2017/07/27/us/politics/scaramucci-priebus-leaks.html. For a pessimistic assessment of Kelly's ability to bring order to the White House, see Peter Baker, *Trump Tries to Regroup as the West Wing Battles Itself*, NY TIMES (July 29, 2017), available at https://www.nytimes.com/2017/07/29/us/politics/trump-presidency-setbacks.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0.

[66] Tara Palmeri and Josh Dawsey, *Trump Ousts Scaramucci as Communications Director,* POLITICO (July 31, 2017), available at http://www.politico.com/story/2017/07/31/trump-ousts-scaramucci-as-communications-director-241172.

[67] Glenn Thrush, Michael D. Shear, and Eileen Sullivan, *John Kelly Quickly Moves to Impose Military Discipline on White House,* NY TIMES (Aug. 3, 2017), available at

https://www.nytimes.com/2017/08/03/us/politics/john-kelly-chief-of-staff-trump.html?emc=edit_th_20170804&nl=todaysheadlines&nlid=15539613&_r=0.

[68] Philip Rucker and Robert Costa, *Inside Trump's White House, New York Moderates Spark Infighting and Suspicion*, WASH. POST (March 18, 2017), available at https://www.washingtonpost.com/politics/inside-trumps-white-house-new-york-moderates-spark-infighting-and-suspicion/2017/03/18/51e3c4d2-0b1c-11e7-a15f-a58d4a988474_story.html?utm_term=.3fa5229c1ab2.

also rumored to favor a carbon tax.[69] Cohn has been described as "a central force in the vicious policy battles playing out in President Donald Trump's White House."[70] Kushner and Bannon have engaged in what some have called a civil war within the White House,[71] vying for influence on the President. Indeed, the Bannon-Kushner conflict seems to have defined much of the early Trump Administration, not only in terms of internal politics but as part of a "larger struggle to guide the direction of the Trump presidency, played out in "disagreements over the policies Mr. Trump should pursue, the people he should hire and the image he should put forth to the American people."[72] Supposedly, "the main players have grown so wary of leaving Mr. Trump's side that it has become hard to organize meetings of senior officials without him, to thrash through policies or hiring choices, slowing up an already fitful process."[73]

The various players play shifting roles, as their influence on the President is thought to wax or wane. By mid-April, Kushner was thought to be in ascendancy, leading to resentment by others who lack a familial connection with the President.[74] Kushner's influence was reflected in a move away from nationalism toward globalism in the Administration's foreign policy stance.[75] By late May, however,

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[69] Josh Dawsey, Annie Karni, and Andrew Restuccia, *Carbon Tax Debate Exposes Rift Among Trump's Aides*, POLITICO (March 21, 2017), available at http://www.politico.com/story/2017/03/trump-carbon-tax-white-house-236327. According to one observer, at least, Bannon's real fight is against Gary Cohn. Olivia Nuzzi, *Steve Bannon's Biblical Fall* (April 16, 2017), available at http://nymag.com/daily/intelligencer/2017/04/steve-bannons-biblical-fall.html.

[70] Nancy Cook and Andrew Restuccia, *Inside the White House's Policymaking Juggernaut*, POLITICO (July 5, 2017), available at http://www.politico.com/story/2017/07/05/trump-gary-cohn-policy-battles-national-economic-council-240217. According to Cook and Restuccia, Cohn has been particularly at odds with Peter Navarro, the White House Trade Advisor, who favors a nationalist, anti-globalist perspective akin to Bannon's. Id.

[71] Sarah Ellison, The Inside Story of the Kushner-Bannon Civil War, VANITY FAIR (May 2017), available at http://www.vanityfair.com/news/2017/04/jared-kushner-steve-bannon-white-house-civil-war.

[72] Maggie Haberman, Jeremy W. Peters, and Peter Baker, *In Battle for Trump's Heart and Mind, It's Bannon vs. Kushner*, NY Times (April 6, 207), available at https://www.nytimes.com/2017/04/06/us/politics/stephen-bannon-white-house.html.

[73] Id.

[74] Ashley Parker and John Wagner, *Kushner has a Singular and Almost Untouchable Role in Trump's White House*, Wash. Post (April 3, 2017), available at https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/04/13/daily-202-trump-s-lurch-toward-corporatism-globalism-shows-why-bannon-s-marginalization-matters/58ef11ebe9b69b3a72331e7d/?utm_term=.ecee4bf3baa8.https://www.washingtonpost.com/politics/kushner-has-a-singular-and-almost-untouchable-role-in-trumps-white-house/2017/04/03/df4e7cf8-1897-11e7-855e-4824bbb5d748_story.html?utm_term=.a104f7058efa. Kushner's family connection may empower him to be more objective and could lead to better delegation, but could always lead to obvious issues of favoritism and resentment from other staff. See Jeffery Sonnenfeld, *Trump's White House Is a Family Business. That's Not a Bad Thing*, POLITICO (April 8, 2017), available at http://www.politico.com/magazine/story/2017/04/trump-white-house-family-business-215002.

[75] James Hohmann, *Trump's Lurch Toward Corporatism, Globalism Shows Why Bannon's Marginalization Matters*, WASH. POST. (April 13, 2017), available at https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/04/13/daily-202-

there were reports that other aides were pressuring Kushner to withdraw from his active White House role due to fallout from investigations into the Trump campaign's contacts with Russia.[76] By the end of July, commentators were dismissing the influence of Kushner and his wife, Ivanka Trump, on policy, while noting their greater influence on important personnel decisions.[77]

The internal frictions within the White House were exemplified by the battle over withdrawal from the Paris Agreement on climate change. Bannon was supported by EPA Administrator Scott Pruitt and White House Counsel Don McGahn, while Ivanka Trump, economic advisor Gary Cohn, and Secretary of State Rex Tillerson opposed withdrawal.[78] Ms. Trump organized a campaign of CEOs to support the agreement, culminating in a full-page ad in the *Wall Street Journal.*[79] The President ultimately stuck with the position he had taken during the campaign and decided to withdraw from the agreement.[80] All of these internal debates took place in full public view. Bannon, who had been rumored to be on his way out in April, had successfully managed to overcome resistance from Ivanka Trump and Rex Tillerson.[81]

Notably, Secretary Tillerson, from the department (State) with the most direct expertise on international agreements, had strongly opposed Trump's ultimate decision and remained unrepentant after the fact. Gary Cohn, Director of the

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trump-s-lurch-toward-corporatism-globalism-shows-why-bannon-s-marginalization-matters/58ef11ebe9b69b3a72331e7d/.

[76] Glenn Thrush, Maggie Hagerman, and Sharon LaFraniere, *Jared Kushner's Role Is Tested as Russia Case Grows*, NY TIMES (May 28, 2017), available at https://www.nytimes.com/2017/05/28/us/kushner-trump-relationship-russia-investigation.html.

[77] Annie Karni and Eliana Johnson, *Ivanka and Jared Find Their Limits in Trump's White House*, POLITICO (July 30, 2017), available at http://www.politico.com/story/2017/07/30/ivanka-trump-jared-kushner-241149.

[78] Ashley Parker, Philip Rucker and Michael Birnbaum, *Inside Trump's Climate Decision: After Fiery Debate, He 'Stayed Where He's Always Been'*, WASH. POST. (June 1, 2017), available at https://www.washingtonpost.com/politics/inside-trumps-climate-decision-after-fiery-debate-he-stayed-where-hes-always-been/2017/06/01/e4acb27e-46db-11e7-bcde-624ad94170ab_story.html?hpid=hp_hp-top-table-main_parisreconstruct-850pm%3Ahomepage%2Fstory&utm_term=.bdc827ff7195.

[79] Id.

[80] Id.

[81] Alexander Nazaryan, *Steve Bannon Regains Power, As Paris Withdrawal Shows*,

NEWSWEEK (June 2, 2017), available at http://www.newsweek.com/steve-bannon-regains-power-paris-withdrawal-619895. By mid-July, however, Bannon was said to have pulled back from policy debates in order to maintain his position in the White House. See Eliana Johnson and Annie Karni, *Steve Bannon's Disappearing Act*, POLITICO (July 21, 2017), available at http://www.politico.com/story/2017/07/21/steve-bannons-disappearing-act-240778. If so, this is an indication of the instability of White House affairs.

National Economic Council, also strongly opposed withdrawal.[82] On the other side, "Pruitt, who frequently attacked the EPA's regulations in court when he was Oklahoma's attorney general, used his new post as EPA administrator to orchestrate an aggressive campaign to marshal conservative opposition to the Paris agreement."[83]

There is no indication that Pruitt ever consulted climate change experts on EPA's staff about the Paris Agreement. Instead, Pruitt has led a campaign for Administration-wide action to challenge well-settled climate science.[84] Given scientifically unfounded statements by other cabinet-level officials on the subject, he has presumably found a receptive audience.[85]

Thus, Trump's decision turned out to be relatively expertise-free,[86] and was attributed to a combination of outside pressure and Trump's long-time conviction: "The president has long believed, rightly or wrongly, that the U.S. is getting a raw deal under the accord, and it proved nearly impossible to change his mind."[87] Whether or not the final decision was wise, it seems clear that scientists were shut out of the process. And the others trying to change his mind faced an insurmountable hurdle.

As the struggle over the Paris Agreement indicates, staff members have felt free to rally public support for their positions outside the White House, in the hope

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[82] Andrew Restuccia and Josh Dawsey, *How Bannon And Pruitt Boxed In Trump On Climate Pact --The Two Advisers Have Spent Months Building Pressure On The President To Exit The Paris Deal — And Trying To Outmaneuver Ivanka Trump*, Politico (May 31, 2017), available at http://www.politico.com/story/2017/05/31/trump-paris-climate-agreement-239008.

[83] Id.

[84] Brady Dennis and Juliet Ellperin, *EPA Chief Pushing Governmentwide Effort to Question Climate Change Science*, Wash. Post (July 1, 2017), available at https://www.washingtonpost.com/news/energy-environment/wp/2017/07/01/epa-chief-pushing-governmentwide-effort-to-question-climate-change-science/?utm_term=.6e3ad15e8003.

[85] See Chris Mooney, *A Flurry of Recent Statements Suggest Widespread Climate Doubt in the Trump Administration,* WASH. POST (June 23, 2017), available at https://www.washingtonpost.com/news/energy-environment/wp/2017/06/23/there-really-isnt-much-mystery-about-what-trump-and-his-government-think-about-climate-change/?utm_term=.c1d14c320834.

[86] The decision was widely condemned by foreign policy experts and economists. See Jennifer Potvin, What Brookings Experts Have Said on Trump's Paris Climate Accord Decision, (June 6, 2017), /https://www.brookings.edu/blog/planetpolicy/2017/06/06/what-brookings-experts-have-said-on-trumps-paris-climate-accord-decision/; Devon Ryan, *Q&A with Stanford Experts on the President's Paris Climate Agreement Decision* (June 1, 2017) available at http://news.stanford.edu/2017/06/01/qa-climate-experts-paris-agreement-decision; Robert N. Stavins, *The Economics (and Politics) of Trump's Paris Withdrawal*, Harvard Kennedy School Belfer Center for Science and International Affairs (June 6, 2017)("the president has little understanding of the nature of the agreement, the process for withdrawal, or the implications of withdrawal for the United States, let alone for the world"), available at http://www.belfercenter.org/publication/economics-and-politics-trumps-paris-withdrawal.

[87] Restuccia and Dawsey ["Boxed in" article], supra note 82.

of influencing the President. The contending White House officials have hired their own chiefs of staff and public relations staff.[88] The use of independent public relations representatives for staff within the White House appears to be a unique development in the Trump Administration, seemingly in part because members of other factions do not trust the press office to protect their interests.[89]

Management experts worry that key White House staff members are too fractious and too eager to gain favor with the President to constitute an effective "team of rivals."[90] The warring power centers seem to have originated a slew of leaks, with White House staff and agency heads describing a "litany of suspicions", including efforts by rival factions to undermine them with leaks, prompting extraordinary efforts to keep communications secret from other groups. They also fear sabotage by anti-Trump agency staff.[91] By all accounts, tensions escalated after the effort to pass a major health care bill hit a speed bump in late March of 2017.[92]

There are undoubtedly potential benefits of allowing scope for conflict within government organizations in terms of generating information and promoting accountability.[93] For that reason, it is possible that the existence of competing White House power centers might have advantages. But the conflicts may also be interfering with the operation of the White House by absorbing energy in internecine strife and confusing communications to and from the rest of the executive branch. In addition, given that any president necessarily has limited individual bandwidth, the existence of competing claims on his attention may produce diversity at the expense of informational breadth and depth.[94]

Furthermore, the willingness of staff members to publicize conflicting views outside the White House undermines the president's ability to communicate a clear message. In addition, members of Congress may be confused about the White

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[88] Tara Palmer, *Trump's Aides Build Their Own Empires in the West Wing*, Politico (July 6, 2017), available at http://www.politico.com/story/2017/07/06/trump-west-wing-staff-kushner-240244.

[89] Id.

[90] Annie Linskey, *Warring West Wing Factions Dismay Management Experts*, BOSTON GLOBE (Feb. 18, 2017), available at https://www.bostonglobe.com/news/politics/2017/02/18/trump-first-month-has-management-experts-shaking-their-heads/X8QBWGZozkaqLw4IOFpXeM/story.html.

[91] Alex Isenstadt and Kenneth P. Vogel, *'People Are Scared': Paranoia Seizes Trump's White House*, POLITICO (March 15, 2017), available at http://www.politico.com/story/2017/03/trump-white-house-paranoia-236069.

[92] Alex Isenstadt, *White House Blame Game Intensifies as Trump Agenda Stalls*, POLITICO (March 26, 2017), available at http://www.politico.com/story/2017/03/trump-blame-agenda-stalls-236508.

[93] For an extensive discussion of these possible benefits, see Daniel A. Farber and Anne Joseph O'Connell, *Agencies as Adversaries* [forthcoming, *Cal. L. Rev*.]

[94] Advisors also risk the President's disfavor, potentially expressed in front of other staff members. See Nancy Cook and Josh Dawsey, *Trump Loses Patience with His White House Counsel*, Politico (June 23, 2017), available at http://www.politico.com/story/2017/06/23/trump-don-mcgahn-white-house-counsel-russia-239876 ("No top aide is immune from the president's anger or being called out in front of colleagues. . . ").

House's positions. During negotiations over health care reform, legislators complained that "different White House aides are giving different pitches and messages to Capitol Hill lawmakers on replacing Obamacare."[95] Vice President Michael Pence has played a significant advocacy role with Congress, perhaps smoothing some of these conflicts.[96]

The turmoil is an indication of unsettled communication and reporting lines within the White House. Perhaps Kelly's appointment as Chief of Staff will address these problems, though some of them seem likely to be recalcitrant. Whatever happens within the White House itself, as we will see in the next section, there have been strong efforts to further increase the centralization of the executive branch.

C. The White House: Relationship with Agencies

As with his predecessors, Trump has attempted to restructure the administrative process to strengthen White House control. At the end of his first month in office, President Trump issued an executive order imposing a "regulatory cap" on compliance costs and requiring that at least two regulations be repealed whenever a new regulation is adopted.[97] Another executive order called on the Director of the Office of Management and Budget to "submit to the President a proposed plan to reorganize the executive branch in order to improve the efficiency, effectiveness, and accountability of agencies."[98] In another bid to exercise more control over agencies, a working group in the White House Counsel's office is charged with devising legal strategies to reduce agency authority.[99]

Relationships with cabinet officers have been an on-going issue in the Trump Administration. For instance, Secretary of State Tillerson only learned about a shift away from a two-state solution in the Middle East when the shift became public while he was on a flight.[100] He was also publicly at odds with Trump's position on a dispute between Qatar and Saudi Arabia, in which he clashed with both Kushner and

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[95] Dawsey, Karni, and Restuccia, supra note 69.

[96] Glenn Thrush and Maggie Haberman, *Amid White House Tumult, Pence Offers Trump a Steady Hand* (March 28, 2017), available at https://www.nytimes.com/2017/03/28/us/politics/vice-president-mike-pence.html?_r=0.

[97] Donald J. Trump, Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs (Jan. 30, 2017), available at https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling.

[98] Presidential Executive Order on a Comprehensive Plan for Reorganizing the Executive Branch (March 13, 2017), available at https://www.whitehouse.gov/the-press-office/2017/03/13/presidential-executive-order-comprehensive-plan-reorganizing-executive.

[99] Zeke J. Miller, *President Trump's Lawyers Plan a White House Legal Attack on Federal Agency Power*, TIME (March 13, 2017), available at http://time.com/4700311/donald-trump-white-house-counsel-steve-bannon/.

[100] Eli Stools and Josh Dawsey, *Trump Ignores 'the Grown-ups' in his Cabinet: Foreign Policy Chiefs Struggle to Influence a Wobbly White House,* POLITICO (Feb. 17, 2017), available at http://www.politico.com/story/2017/02/trump-ignoring-cabinet-235124.

Bannon.[101] Frictions rose to the point of angry outbursts by Tillerson against other White House staff.[102] The battles within competing White House power centers have "helped unify the partially formed Cabinet into an actual team," who are "working together, fighting to staff the agencies they lead and to maximize their collective influence over an administration struggling to find stability."[103] The President's public attacks on Attorney General Sessions also led to increased concern by cabinet officers about their own relationships with the White House.[104] As a related matter, the public positions taken by these agencies have not been well coordinated with the White House's statements.[105]

Cabinet officers have sometimes seemed to have little influence on White House decisions even when they have been consulted. They have faced White House resistance to their staff choices, even in cases where they were promised autonomy or veto power.[106] Another indication of the relative weakness of cabinet officers and other agency heads comes from the budget process. For instance, despite Pruitt's pleas to restore some EPA budget cuts, the final budget proposal contained additional cuts instead.[107] Interior Secretary Ryan Zinke had a similar experience, while Energy Secretary Perry was on record during his confirmation hearings as enthusiastically supporting some programs that were zeroed out of the proposed budget.[108] More surprisingly, Trump launched a public campaign denouncing his Attorney General, Jeff Sessions.[109]

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[101] David E. Sanger, Gardiner Harris, and Mark Landler, *Where Trump Zigs, Tillerson Zags, Putting Him at Odds with White House*, NY TIMES (June 25, 2017), available at https://nyti.ms/2u3TgEL.

[102] See Josh Dawsey, Eliana Johnson and Alex Isenstadt, *Tillerson Blogs Up At Top White House Aide*, Politico (June 28, 2017), available at http://www.politico.com/story/2017/06/28/tillerson-blows-up-at-white-house-aide-240075. For a later incident with Tillerson and a different staff member, see Josh Dawsey and Eliana Johnson, *Tillerson Argued With a Different Staff Member*, POLITICO (June 30, 2017), available at http://www.politico.com/story/2017/06/30/tillerson-has-second-argument-with-trump-aide-240160.

[103] Stools and Dawsey, supra note 100.

[104] Peter Baker, Jeremy W. Peters, and Rebecca R. Ruiz, *In Trump's World, 'Very Weak' Sessions Twists in Wind*, NY TIMES (July 25, 2017), available at https://www.nytimes.com/2017/07/25/us/politics/trump-attacks-own-attorney-general-jeff-sessions.html.

[105] See Ashley Parker, *Trump's Cabinet Has to Work as a Cleanup Crew*, WASH. POST (Feb. 26, 2017), available at https://www.washingtonpost.com/politics/cleanup-duties-are-a-big-part-of-the-job-in-the-trump-cabinet/2017/02/25/f060ffd0-faeb-11e6-9b3e-ed886f4f4825_story.html?utm_term=.92fb2708f7d1.

[106] Id.

[107] Karen Bogadus and Christa Marshall, *Budget Losses Show Secretaries Lack White House Sway*, E&E NEWS (March 20, 2017).

[108] Id.

[109] See Lydia Wheeler, *Timeline: How the Trump and Sessions Relationship Deteriorated*, THE HILL (July 29, 2017), available at http://thehill.com/homenews/administration/344165-timeline-how-the-trump-and-sessions-relationship-deteriorated.

Despite these frictions, Trump has established close relationships with some agency heads. In particular, he has frequent meetings with a handful of favored cabinet members, relying on them for input about policy issues.[110] In part, the motivation seems to be his continued hostile relations with the bureaucracy, including those within the White House:

> Senior aides say Trump demands face time with his appointees in part because he doesn't trust bureaucrats who do the day-to-day work of the federal government. The president shuns them as tools of what he often refers to as the "deep state," and blames them for frequent, unflattering news stories coming from his White House, according to two White House aides.[111]

Some agency heads are favored over others. Journalists' reviews of White House records revealed that "Pompeo [CIA], Tillerson [State Department] and others, such as Department of Homeland Security Secretary John Kelly, are frequent White House visitors, some Cabinet secretaries have had little interaction with Trump, including Energy Secretary Rick Perry, Housing and Urban Development Secretary Ben Carson and Agriculture Secretary Sonny Perdue."[112] But even the favored agency heads pay a price, and some aides fear that the amount of time spent advising Trump cuts into their ability to direct their agencies and interact with the bureaucracy.[113]

One distinctive innovation in the Trump Administration was the placement inside agencies of "political aides" reporting to the White House.[114] These aides were installed in at least sixteen agencies, charged with monitoring the agency head's adherence to administration policy.[115] They reported to Rick Dearborn, who is a White House deputy chief of staff (and therefore in the Priebus sphere of influence).[116] In some agencies, these White House agents seemed to be fitting in; in others, they were a source of friction with high-level agency officials.[117]

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[110] Tara Palmeri and Andrew Restuccia, *Trump demands face time with favored Cabinet heads: CIA chief Mike Pompeo spends three hours almost every day driving downtown from Langley to brief the president, and he's not alone*, POLITICO (June 19, 2017), available at http://www.politico.com/story/2017/06/19/trump-cabinet-white-house-239691.

[111] Id.

[112] Id.

[113] Id.

[114] Lisa Rein and Juliet Ellperin, *White House Installs Political Aides at Cabinet Agencies to be Trump's Eyes and Ears*, WASH. POST (March 19, 2017), available at https://www.washingtonpost.com/powerpost/white-house-installs-political-aides-at-cabinet-agencies-to-be-trumps-eyes-and-ears/2017/03/19/68419f0e-08da-11e7-93dc-00f9bdd74ed1_story.html?utm_term=.eb870bd6461f.

[115] Id.

[116] Id.

[117] Id.

The use of "political aides" posed other management challenges. They provide disgruntled agency staff with a channel of communicating directly with the White House, doing an end-run around the agency head. Correspondingly, control of the information reaching the political aide is a necessary concern for agency heads. Not surprisingly, observers spoke of an escalating battle between cabinet secretaries and their staff versus the White House envoys in the agencies.[118] By the beginning of May, there were reports that the White House was giving ground and allowing agency heads to decide whether or not to keep their White House liaisons.[119]

For those agency heads who lack direct access to Trump, relationships with the White House are also complicated by the competing power centers within the White House. Different agency heads may have affinities with different power centers, particularly as between the more Establishment Priebus and Kushner, and the anti-Establishment Bannon. Because of the existence of multiple points of entry to the White House, agency heads may need to curry influence with one or more power centers, while at the same time trying to manage internal relations within their agencies. Their ability to perform that task is weakened by evidence that they have little power to shape policy or even their agency budgets.

It must be an unusual White House where the West Wing operates in perfect harmony with smoothly coordinated communications to the rest of the Executive Branch, and agency heads work seamlessly with the bureaucracy. If the emerging picture under Trump is unusual, it is only because normal management issues appear to be amplified.

Two important caveats need to be kept in mind. First, some of the issues described here may be transitional. As the President and his top advisors adjust to the governance problems they confront, they may move toward a more structured operation. Given that Trump's management style has remained similar over many years, however, it is hard to know how likely a coherent structure will evolve. At least some of the problems may involve the unusual role played by family members, and it is hard to see how any chief of staff could hope to limit family influence or direct access to the President.

Second, some problems conceivably may be less severe than public reports indicate. They are based on information from insiders, all of whom have their own agendas. Reporters may have a natural tendency to exaggerate problems for dramatic effect. Yet, many of the reports seem to be from experienced observers with knowledge of multiple presidential administrations, suggesting that the Trump Administration's management strategy (and resulting problems) were truly unusual—even before the mid-May appointment of a special counsel to

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[118] Alex Isenstadt and Andrew Restuccia, *Civil War Rages Throughout Trump Administration*, POLITICO (April 6, 2017), available at http://www.politico.com/story/2017/04/trump-white-house-civil-war-236917.

[119] Michael Grunwald, Andrew Restuccia, and Josh Dawsey, *Trump Starts Dismantling His Shadow Cabinet*, POLITICO (May 2, 2017).

investigation potential collusion between the Trump campaign and Russia.[120] With widespread reports that Trump himself was under investigation for obstruction of justice, White House staff were under pressure to obtain independent legal representation.[121] Combined with concerns about Trump's management style, the investigation was reportedly interfering substantially with recruitment of Republicans for political appointments within the White House and agencies.[122]

It would not be a complete exaggeration to say that the only stable aspect of the White House's organization is the President's position at the center. But Trump's own policy positions can shift rapidly, making it hard for agencies to rely on his expressed views. One report points to a forty-eight-hour period during which the President changed his mind on a host of issues, including such important matters as strategies toward North Korea, the value of NATO, whether to use military force in Syria, and the benefits of the Export-Import Bank.[123] Two months later, in the course of twenty-four hours, he first advocated complete repeal of a major healthcare statute, then said he would allow the statute to collapse of its own weight without congressional action, and then demanded that Senators remain in town until they had agreed on a replacement for the law.[124] Under these circumstances, it is difficult

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[120] Acting Attorney General Rod K. Rosenstein, *Office of The Attorney General: Order No. 3915-2017 Appointment of Special Counsel To Investigate Russian Interference with the 2016 Presidential Election And Related Matters* (May 17, 2017).

[121] Darren Samuelson, *Escalating Investigation Puts Trump and His Staff at Legal Odds: The Interests of the President and His Aides are Diverging, Increasing the Legal Risks for Those Who Try to Stay Loyal Instead of Hiring Their Own Lawyers*, POLITICO (June 16, 2017), available at http://www.politico.com/story/2017/06/16/donald-trump-staff-investigation-legal-counsel-239658.

[122] According to a press report,

> Trump's firing of FBI Director James B. Comey last month and the escalating probe into Russian interference in the presidential election have made hiring even more difficult, say former federal officials, party activists, lobbyists and candidates who Trump officials have tried to recruit.
>
> Republicans say they are turning down job offers to work for a chief executive whose volatile temperament makes them nervous. They are asking head-hunters if their reputations could suffer permanent damage, according to 27 people *The Washington Post* interviewed to assess what is becoming a debilitating factor in recruiting political appointees.

Lisa Rein and Abby Phillip, *Help wanted: Why Republicans Won't Work for the Trump Administration,* WASHINGTON POST (June 17, 2017), available at https://www.washingtonpost.com/politics/help-wanted-why-republicans-wont-work-for-the-trump-administration/2017/06/17/61e3d33e-506a-11e7-b064-828ba60fbb98_story.html?utm_term=.3422be2a9c45.

[123] Jill Colvin, *Why is Trump Changing His Mind?*, U.S. News (April 14, 2017) https://www.usnews.com/news/politics/articles/2017-04-13/is-this-a-new-trump-abrupt-reversals-may-reflect-experience.

[124] *Trump changes mind again, telling senators to get health bill 'on my desk'*, THE GUARDIAN (July 19, 2017), available at

https://www.theguardian.com/us-news/2017/jul/19/donald-trump-healthcare-bill-revived-obamacare-senate

for agencies to rely with confidence on presidential statements as a guide to day-to-day decision-making.

This is a very different picture than the one Kagan and other advocates of expanded Presidential power have painted. In the next section we look more carefully at Kagan's view, which was based largely on the Clinton Administration, and how her analysis compares to the current Administration.

III. Rethinking Assumptions About the Operation of the Presidency

Kagan viewed the Clinton Administration as the time when "presidential control of administration . . . expanded dramatically."[125] Faced with a hostile Congress, Clinton "turned to the bureaucracy" to achieve his foreign policy goals.[126] In so doing, Clinton set the administrative agenda and shaped the regulatory output.[127]

Like Trump, Clinton's approach stressed the President's power to command public attention:

> Clinton regularly issued formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course. And at the back end of the process . . . Clinton personally appropriated significant regulatory action through communicative strategies that presented regulation and other agency work product . . . as his own, in a way new to the annals of administrative process.[128]

Kagan gives several examples of this technique. In one notable example, Clinton spoke "before there was any proposal to speak of."[129] In a commencement address, he announced a new federal program for paid parental leave.[130] Later, at the beginning of the formal comment period for the proposed rule, he "spoke of the plan . . . as essentially consummated."[131] Still later, review of the draft rule by the Office of Management and Budget (OMB), he used a radio speech to announce the final regulation.[132]

As Kagan pointed out, unlike President Reagan's executive orders on cost-benefit analysis, Clinton's executive implicitly suggested that the President had ultimate power to direct an agency's rule-making decisions.[133] Although it did not

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[125] Kagan, supra note 2, at 2248.

[126] Id. at 2248.

[127] Id.

[128] Id. at 2249.

[129] Id. at 2284.

[130] Id.

[131] Id.

[132] Id.

[133] Id. at 2288.

directly assert such a power, it did require that disputes between an agency and OMB be resolved at the presidential level.[134] Asserting the power of a presidential directive to displace an agency's preferences was for Clinton "to say something significant about the nature of the relationship between the agencies and the President – to say that they were *his* and so to were their decisions."[135] His directives, issued prior to the formal White House review by OIRA, were "Clinton's primary means, self-consciously undertaken, both of setting an administrative agenda that reflected and advanced his policy and political preferences and of ensuring the execution of this program."[136] The ability to shape administrative action this way was not, however, unlimited, since agency resistance or criticism of a directive could be politically costly.[137]

In his second term, Kagan says, "[i]n speech after speech, Clinton claimed ownership of administrative actions, presenting them to the public as his own – as the product of his values and decisions."[138] Meanwhile, his "appropriation of regulatory action, even when wholly post hoc, sent a loud and lingering message: these were *his* agencies, *he* was responsible for their actions; and *he* was due credit for their successes" – an unmistakable message to those in the Executive Office of the President and the agencies.[139]

As Kagan points out, such activities raise public expectations that agency actions will reflect presidential policies, and thereby increase the pressure on presidents to exert effective influence over agencies.[140] Kagan viewed this as a new and desirable development in the long story of conflict between presidents and the federal bureaucracy.[141] This expansion of presidential power was all the more appealing for presidents, she argued, given that "the possibility of significant legislative accomplishment . . . has grown dim in an era of divided government with high polarization between congressional parties."[142]

Kagan's emphasis on presidential administration has continued to find support among legal scholars. Writing in 2016, Cary Coglianese and Kristin Firth

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[134] Id.

[135] Id. at 2290. David Barron agrees that Clinton's use of these directives was an important innovation. David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 78 GEO. WASH. L. REV. 1095, 1115-1116 (2009)

[136] Id. Notably, early suggestions for Presidential direction of the bureaucracy had contemplated a need for additional legislation. Id. at 2293. President George H.W. Bush issued only four such directives in four-year term, whereas Clinton issued 107 in eight years. Id. at 2294.

[137] Id. at 2298.

[138] Id. at 2300.

[139] Id. at 2302. Clinton rarely played this role, however, "in formulating agency rules and other decisions relating to hazardous substances in the environment and workplace." Id. at 2308.

[140] Id. at 2310.

[141] Id. at 2273-2274.

[142] Id. at 1311.

highlighted presidential control of administration during the Obama Administration.[143] White House directives dictated agency decisions on issues such as major pollution standards, health care implementation, and immigration enforcement.[144] As they observed, recent presidents of both parties "have publicly proclaimed their authority to direct the administration of the federal government," with George W. Bush famously calling himself "the decider" and Obama saying, "I've got a pen to take executive actions where Congress won't."[145]

One reasons for presidents to take stronger control is the prospect that they will in any event be "held politically accountable for how agencies exercise their vast administrative powers."[146] Coglianese and Firth's empirical study found that members of the public gave credit to presidents for successful regulatory decisions but were even more strongly inclined to blame presidents for bad decisions.[147] Avoiding such blame could provide an additional motive for presidents to exercise control over agency decision, even if the president was not otherwise inclined to do so. It is easy to envision a feedback cycle in which presidents take control of major agency decisions, fortifying the public's tendency to assign blame to the president for unpopular outcomes, which in turn strengthens the pressure on the president to assert control.

The directive power has its strengths as well as its limits. In assessing the use of presidential directives, David Barron argued that the power to direct "can be constantly shaped and tweaked on a case-by-case basis so as to ensure that, as a whole, the strategy well-reflects the particular policy desires of the President at a given moment."[148] Thus, he said, "[i]ts ad hoc quality is its virtue."[149] But, he suggested, this power is limited in its application because it is "too limited, too weak, too small bore to amount to much."[150] He noted that "such directives seem more

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[143] Cary Coglianese and Kristin Firth, *Separation of Powers Legitimacy: An Empirical Inquiry into Norms About Power*, 164 U. PA. L. REV. 1869, 1870 (2016).

[144] Id. Another example is provided by the handling of California's request for an EPA waiver to allow it to regulate greenhouse gases from vehicles, where EPA was first directed by Bush to deny the waiver and then directed by Obama to reconsider.

[145] Id. at 1875. For a more comprehensive description of Obama's use of presidential authority, see Andrew Rudalevige, *Old Laws, New Meanings*: *Obama's Brand of Presidential "Imperialism,"* 66 SYRACUSE L. REV. 1. 14-31 (2016).

[146] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264 (2006).

[147] Id. at 1882-1883. Once presidents became involved in decisions, they tended to receive responsibility whether or not they directed the decision or merely made requests, and they were especially likely to be given responsibility when their preferences prevailed over those of the agency head. Id. at 1900, 1904.

[148] Barron, supra note 135, at 1117.

[149] Id.

[150] Id. at 1119.

likely to be a limited tool for making some incremental policy advances in the face of legislative gridlock."[151]

Appointments are another mechanism for presidents to control the Executive Branch, and a potentially very potent one. Barron argued that recent presidents "have been making aggressive use of their powers of appointment to remake agencies in their own images."[152] He pointed to the large number of political appointments in agencies, especially those that do not require Senate confirmation, which presidents can and do fill with people who share their own regulatory vision.[153] This provides a cadre of presidential loyalists who can not only ride herd on the civil servants but who can also keep an eye on the higher-level political appointees, who may sometimes be less aligned with the president due to the need to satisfy Senatorial preferences.[154]

An additional mechanism of control that is well discussed in the law review literature is centralized review of agency actions by the Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB). This review clearly allows the White House as an institution to exercise more power over regulatory matters. As discussed in the Introduction, Presidents Bush (2) and Trump both made heavy use of this method of control.

There is considerable dispute about the relative strength of these different mechanisms for presidential control. Barron argued that OMB may not be easily amenable to presidential influence, however, because it is a technocratic organization, largely staffed by civil servants, and dedicated to the goal of minimizing regulatory costs.[155] This was one reason for Barron's emphasis on the appointments power as a mechanism of control. In contrast, political scientists Terry Moe and Scott Wilson argued that appointments power has limits as a way to control agencies: because political appointees "need the support of agency personnel to do their jobs well, appointees are under pressure to become advocates for the parochial interests of their agencies" and will inevitably develop different policy agendas as decision-making is fragmented over multiple entities.[156] For that reason, they place more emphasis on presidential control via White House centralization of authority in entities like OIRA and the National Security Council.[157]

Despite these disputes over relative effectiveness, there does seem to be general agreement about the primary instruments available to presidents in order

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[151] Id. at 1120.

[152] Barron, supra note 135, at 1096.

[153] Id. at 1123-1133.

[154] Id. at 1132.

[155] Id. at 1113.

[156] See Terry M. Moe and Scott A. Wilson, *Presidents and the Politics of Structure*, 57 L. & CONTEMP. PROBS. 1, 28 (1994).

[157] Id. 18-19.

control decision-making in the executive branch. Trump has made vigorous use of the directive power. Two notable examples are executive directives to reconsider major Obama-era environmental rules dealing with wetlands protection and climate change, including strong hints as to the direction the reconsideration should take.[158]

IV. Reassessing the Costs and Benefits of Presidential Administration

Kagan pointed to several advantages to presidential administration. To begin with, she argued, the President's actions have far greater accountability than an agency's. While bureaucracy is "the place where exercises of coercive power are most unfathomable and thus most threatening," the presidency is the "office peculiarly apt to exercise power in ways that the public can identify and evaluate."[159] Moreover, because of the President's national constituency, "he is likely to consider, in setting the direction of administrative policy on an on-going basis, the preferences of the general public rather than merely parochial interests."[160] As a unitary actor, the President can "act without the indecision and inefficiency that so often characterize the behavior of collective entities;"[161] while the broad scope of his authority allows him to "synchronize and apply general principles to agency action in a way that congressional committees, special interest groups, and bureaucratic experts cannot."[162]

Finally, the president can provide energy and dynamism to the regulatory process.[163] Kagan argued that the general need for a vigorous executive is especially acute in the administrative context.[164] She asserted that "large-scale organizations, left to their own devices, exhibit over time a diminished capacity to innovate and a correspondingly greater tendency to do what they have always done in the face of

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[158] See Donald J. Trump, Presidential Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule (Feb. 28, 2017); Donald J. Trump, Presidential Executive Order on Promoting Energy Independence and Economic Growth (March 28, 2017).

[159] Id. at 2332.

[160] Id. at 2335.

[161] Id. at 2339.

[162] Id. In contrast, Lisa Heinzerling suggests that Presidents and their staff "should, more often, put down their pens and their phones and let the agencies do their work." Lisa Heinzerling, *A Pen, A Phone, and the U.S. Code*, 103 GEO L.J. ONLINE (2016). Although conceding the descriptive accuracy of Kagan's account of the expanding presidential role, she suggests that rather than adding energy to the regulatory system, presidents at least as often obstruct the efforts of agencies to get things done. Id. at 60. She also questions whether presidential involvement increases accountability. In her experience as an Assistant Administrator at EPA, she found that many White House actions were taken under the radar with little public visibility, often at the behest of industry. Id. at 60-63.

[163] Kagan, supra note 2, at 2351.

[164] Id. at 2343.

dramatic changes in needs, circumstances, and priorities."[165] For that reason, she considered "torpor a defining feature of administrative agencies."[166]

In turning to possible critiques of her position, Kagan argued that any tendency by Presidents to push past the edges of legality can be combatted by the courts.[167] She also argued that the risk of displacing agency expertise is overblown by critics, although she admitted this was possible.[168] Her solution was to suggest that presidential administration "operate with an attitude of respect toward agency experts and with a set of processes that encourage consultation," and that presidents should hesitate to intervene "in areas of administration in which professional knowledge has a particularly significant and needed function," such as "regulatory action that in large measure depends on scientific methodology and conclusions."[169]

In addition to the possible criticisms of presidential administration discussed by Kagan, Barron raised an additional concern about "the emergence of a single-minded regulatory vision" in a presidential administration. His concern was that "such regulatory myopia can be a substantial impediment to social learning – a capacity that the administrative system . . . was surely meant to facilitate through its celebration of the autonomous, administrative perspective."[170]

As Kagan observed, "[f]uture developments in the relationship between the President and the agencies may suggest different judicial responses; the practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions."[171] In this regard, the Trump Administration provides an important new set of data points.

President Trump's record to date raises some serious concerns in terms of a number of the issues discussed by Kagan. It is too soon to make generalizations about the legality of his actions. He soon after taking office encountered serious judicial resistance to his orders blocking U.S. entry of citizens from certain Muslim countries, based on evidence of discriminatory intent from his own social media

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[165] Id. at 2344.

[166] Id.

[167] Id. at 2349-50. Bruce Ackerman has emphasized the risk that the president "will be tempted to achieve his objectives by politicizing the administration of whatever-laws-happen-to-be-on-the-books." Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 712 (2000). Ackerman continues, "To be sure, an impartial reading of these statutes might imply that his initiative falls far beyond the limits of legal authority; but with his political partisans in charge of the administration, why shouldn't the president encourage them to bend the law to fulfill the administration's program?" Id.

[168] Kagan, supra note 2, at 2352-2355.

[169] Id. at 2356.

[170] Barron, supra note135, at 1121.

[171] Kagan, supra note 2, at 2385.

declarations.[172] Moreover, Trump has a clear history of attacks on the federal judiciary in connection with pending cases. For instance, when a lower court judge issued a temporary stay of his immigration order, Trump denigrated him on Twitter as a "so-called judge" and said the ruling "essentially takes law-enforcement away from our country, is ridiculous and will be overturned!"[173] He followed up by saying: "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!"[174] Such comments were sufficiently unusual to prompt his own nominee for the Supreme Court, Neil Gorsuch, to refer to them as "disheartening" and "wrong."[175] Violations of the normal conventions for presidential decorum toward the courts are not proof of a propensity toward lawless behavior.[176] But they are indicative of a general lack of respect toward the legal system.

In turn, courts have raised serious concerns about Trump's lack of adherence to legal norms. In reviewing his executive orders to halt immigration from designated countries, the lower courts cast doubt on his invocation of national security as a basis for the orders. In *International Refugee Assistance Project v. Trump*,[177] the Fourth Circuit concluded that the actions were motivated by religious animus toward Muslims and consequently violated the Establishment Clause. The court quoted extensively from Trump's statements as a candidate and from statements by himself and his advisors after he took office.[178] The Ninth Circuit took a different tack in *Hawaii v. Trump*,[179] holding that the orders were defective because Trump had failed to articulate a bona fide national security justification for his sweeping action. What the Supreme Court will make of all this is unclear, given

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[172] The order was temporarily enjoined in Washington v. Trump, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017), motion for stay of district court denied, Trump v. Washington, 847 F.3d 1151 (9th Cir. 2017).

[173] Brian Bennett, *Trump Attacks Federal Judges in Unusually Personal Terms,* LA TIMES (Feb. 28 2017), available at

http://www.latimes.com/politics/la-na-pol-trump-travel-ban-20170208-story.html.

[174] Id.

[175] Abby Phillip, Robert Barnes and Ed O'Keefe, *Supreme Court Nominee Gorsuch Says Trump's Attacks on Judiciary are 'Demoralizing'*, WASH. POST (Feb. 9, 2017), available at https://www.washingtonpost.com/politics/supreme-court-nominee-gorsuch-says-trumps-attacks-on-judiciary-are-demoralizing/2017/02/08/64e03fe2-ee3f-11e6-9662-6eedf1627882_story.html?utm_term=.4b45b2355cac.

[176] On the extent to which Trump's behavior was unusual, see Nina Totenberg, *Trump's Criticism Of Judges Out Of Line With Past Presidents*, NATIONAL PUBLIC RADIO (Feb. 11, 2017), available at http://www.npr.org/2017/02/11/514587731/trumps-criticism-of-judges-out-of-line-with-past-presidents.

[177] 857 F.3d 554 (4th Cir. 2017)(en banc), cert. granted 137 S. Ct. 2080 (2017).

[178] Id. at --. [pagination not yet available]

[179] Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017), cert. granted 137 S. Ct. 2080 (2017).

that it stayed part of the lower court orders but allowed them to stand to the extent they applied to individuals with significant ties to the U.S.[180]

Kagan viewed President Clinton's deference to agency staff on scientific matters as a significant factor in ameliorating potential problems with presidential administration. In contrast, there are clear reasons for concern about Trump's respect for expertise, whether in agencies or elsewhere.[181] For instance, his team of economic advisors is notably lacking in professional economists.[182] Science also seems to receive short shrift in the administration. Trump moved extremely slowly on appointments to key scientific positions within the Administration, and apparently sought no scientific advice before his dramatic decision to exit from the Paris Agreement on climate change.[183] Within the White House staff, many positions for science and technology advisors are vacant, and the few appointees do not regularly participate in his briefings.[184] In another sign of the Administration's distant relationship with the scientific community, the budget proposal he sent to Congress in 2017 included massive cuts to scientific and medical research.[185]

To the extent that agency science is supposed to reach the president via agency heads, that channel may also be sluggish or blocked. For instance, EPA Administrator Scott Pruitt has reportedly relied more heavily on industry lobbyists than on EPA staff in making decisions. Rather then obtaining expert input from staff, he "has outsourced crucial work to a network of lawyers, lobbyists, and other

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[180] Trump v. International Refugee Assistance Project, 137 S. Ct. 2080 (2017)

[181] For a broad survey of the administration's attitude toward expertise, see James Hohmann, *No Relevant Experience? It's Not a Problem for Trump*, WASH. POST (July 24, 2017), available at https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2017/07/24/daily-202-trump-marginalizes-experts-debases-expertise/597548fc30fb043679543214/?utm_term=.158c3b1ec01d&wpisrc=nl_daily202&wpmm=.

[182] Justin Wolfers, *Why Most Economists Are So Worried About Trump*, NY TIMES (Jan. 11, 2017) (https://www.nytimes.com/2017/01/11/upshot/why-most-economists-are-so-worried-about-trump.html.

[183] Chris Mooney, *85 Percent of the Top Science Jobs in Trump's Government Don't Even Have a Nominee*, WASH. POST (June 7, 2016), available at https://www.washingtonpost.com/news/energy-environment/wp/2017/06/06/trump-has-filled-just-15-percent-of-the-governments-top-science-jobs/?utm_term=.881d54885228.

[184] Cecilia Kang and Michael D. Shear, *Trump Leaves Science Jobs Vacant, Troubling Critics*, NY Times (March 30, 2017), available at https://nyti.ms/2oBjfkh. Even in July, the White House Office of Science and Technology had only a third of the staff it had in the Obama Administration, and the science division appears to have had no remaining staff. See Christa Marshall, *Science Office a Shadow of Its Former Staff*, E&E News (July 3, 2017), available at https://www.eenews.net/stories/1060056920.

[185] Joel Achenbach and Lena H. Sun, *Trump Budget Seeks Huge Cuts to Science and Medical Research, Disease Prevention*, WASH. POST (May 23, 2017), available at https://www.washingtonpost.com/news/to-your-health/wp/2017/05/22/trump-budget-seeks-huge-cuts-to-disease-prevention-and-medical-research-departments/?utm_term=.848e19c348e0.

allies, especially Republican state attorneys general."[186] In agencies across the administration, deregulation teams have been assigned to identify regulations for repeal; political appointees from industry and its allies are the dominant voices on these teams.[187]

The description of the Trump White House in Part II raises questions about the extent to which the potential positive benefits of presidential administration will be realized. Rampant conflict among presidential advisors, leading to ad hoc decisions by the President, does not seem conducive to the creation of clear, uniform policies. In cases where the President does not ultimately settle a dispute, conflicting messages from White House staff may leave agencies at a loss for how to proceed. Although Trump's use of social and conventional media may make it easier for the public to attribute actions to him, they can also be a source of confusion, thereby diminishing accountability. For instance, in the litigation over his second travel ban, he publicly blamed its more limited nature (compared with his first ban) on the Justice Department, eliding the fact that it was an executive order that he himself had signed.[188]

Trump's unusual political style and his management style might tempt one to consider him to be an outlier in terms of presidential administration. But his approach to administration can be seen as a continuation of the methods identified by Kagan in her article by which a president can control executive branch policy through the use of publicity and instructions to agencies and can seize credit for administrative actions as his own. Trump is also using other methods, such as centralized review by OIRA and use of social media, which previous presidents had honed. But some of the potential concerns noted by Kagan have materialized in force, such as disregard for scientific expertise and questionable allegiance to the rule of law.

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[186] Coral Davenport, *Counseled by Industry, Not Staff, EPA Chief is Off to a Blazing Start*, NY TIMES (July 1, 2017), available at https://nyti.ms/2uwXByi. Pruitt and Education Secretary Betsy DeVos seem to be the most extreme cases, but some other cabinet-level appointees are also estranged from staff because of the appointee's hostility to their agency's missions. See Juliet Eilperin and Emma Brown, *Cabinet Secretaries' Tough Task: Lack of Funding, Support for Agency Missions*, WASH. POST. (July 2, 2017), available at https://www.washingtonpost.com/politics/cabinet-secretaries-tough-task-lack-of-funding-support-for-agency-missions/2017/07/02/d17279ee-4ad9-11e7-a186-60c031eab644_story.html?utm_term=.5ed58fac56ed. The schism between agency staff and the political appointees extends below Pruitt's level. For example, agency experts were dismayed when new rules governing the chemical industry were shaped by a deputy assistant who had been a lobbyist for the industry until her appointment. Annie Snider, *EPA Staffers, Trump Official Clashed Over New Chemical Rules*, POLITICO (June 22, 2017), available at http://www.politico.com/story/2017/06/22/trump-epa-energy-chemicals-clash-239875.

[187] Danielle Ivory and Robert Paturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, NY TIMES (July 11, 2017), available at https://nytu.com.ms/2v6AHAb.

[188] Trump tweeted: "The Justice Dept. should have stayed with the original travel ban, not the watered down, politically correct version they submitted to S.C. [Supreme Court]." Mica Rosenberg and Andrew Chung, *Trump complicates travel ban case by grumbling at Justice Department*, REUTERS (June 5, 2017), available at https://www.reuters.com/article/us-britain-security-usa-trump-idUSKBN18W1BR.

As we have seen, those issues too have arisen under prior presidents, though not to the same degree. In short, the Trump Administration does not seem to be entirely *sui generis*. Still, some of the issues under Trump do seem notably more severe than his predecessors. Thus, in degree if not in kind, he may differ notably from his predecessors. Nevertheless, even if Trump is an exceptional case, rules must be designed with exceptional cases in mind as well as typical ones. After all, Trump is one of only three presidents to serve since Kagan's article proclaimed the emergence of presidential administration, a not insignificant proportion, and we have no way of knowing whether he will turn out to be unusual or the norm compared with his successors.

More fundamental is the need to calibrate doctrine to take advantage of the strengths of the executive branch and of the President, while also taking into account the risks that attend executive discretion. Those risks seem to be greater than Kagan anticipated when she made her case for presidential administration. It would be an overreaction to call for radical rethinking of current law based on a single presidency. But, so too, would it be to ignore a President who illustrates some of the pitfalls of presidential administration.

V. Implications for Administrative Law

The case for presidential administration seems decidedly less powerful than it may have seemed when Kagan wrote her analysis. This section will consider the relevance of these developments for some long-standing issues in administrative law.

A. The Scope of Directive Power

It is clear that, as a general rule,[189] a president can remove an executive official who fails to follow his directions, even when a matter has been assigned to that official by Congress. As a practical matter, that provides a strong incentive for officials to comply. There is considerable dispute, however, over whether the official has a legal duty to comply or else resign, rather than forcing the president to fire the official. Given that the President may be unwilling for political or other reasons to fire an official, the difference sometimes has practical significance.

Advocates of the unitary executive have argued that the Constitution resolves this dispute in favor of the President, and in fact that a statute purporting to place the final decision in the hands of the agency official would be unconstitutional.[190]

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[189] The primary exceptions being the heads of independent agencies. The leading case on the scope of presidential removal power is Morrison v. Olson, 487 U.S. 654 (1988), in which the Court upheld the constitutionality of a statute (since repealed) establishing an independent prosecutor to investigate crimes within the executive branch. Justice Scalia, a believer in the unitary executive, filed a strong dissent. See id. at 697-734.

[190] See, e.g., Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws,* 104 YALE L.J. 541, 549-550 (1994). In their view, "[t]he Framers and ratifiers consciously and deliberately chose to put one person in charge of executing all federal laws." Id. at 664.

This argument is largely based on the vesting clause of the Constitution, which reposes executive power in the President.[191]

Peter Strauss has marshaled the arguments on the other side of this constitutional issue.[192] There are other clauses of the Constitution that seem to point in the opposite direction. The "take care" clause, for instance, imposes a duty on the President to "take care that the laws be faithfully executed," not a duty to execute the laws faithfully himself, while the "necessary and proper" clause speaks of "powers vested" in the Government of the United States, or in any Department or Officer thereof," which suggests strongly that departments and officers do have their own authority, rather than merely be conduits for presidential action. But the debate over these matters is far too complex to address here.

In any event, Kagan eschewed reliance on the unitary executive theory in her argument for giving the President broad power to direct the actions of executive officers. Unlike unitary executive theorists, she conceded that Congress could grant the power to make final decisions in other officials. But she argued on policy grounds that the President should have the power to direct the actions of executive branch officials unless a statute clearly requires otherwise. The policy reasons in question were the benefits she saw in presidential administration.[193]

Responding to Kagan, Kevin Stack argued that Kagan's presumption in favor of directive authority ignored congressional practice.[194] He identified many statutes

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[191] Lessig and Sunstein vigorously dispute this view of the original understanding:

> We think that the view that the framers constitutionalized anything like this vision of the executive is just plain myth. It is a creation of the twentieth century, not the eighteenth. It derives from twentieth century categories applied unreflectively to an eighteenth century document. It ignores strong evidence that the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper.

Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2-3 (1996). Their analysis of the Framer's view about presidential directives is starkly different than that of the unitary executive scholars. See id. 5-83. Although they do not agree that the Framers specifically understood the Constitution to give the President the directive power, they adopt a novel alternative argument. They argue that in present day circumstances, although not when the Constitution was adopted, the best way to implement the Framers' general concept of separation of powers is to give the President directive power. Id. at 104. This argument is an unusual mix of originalism (as to the general concept of the presidential function) and a "living Constitution" view that the Framers' goals requires different constitutional doctrines at different times. The experience of the Trump Administration may pose as much of a problem for the functionalist side of their argument as it does for Kagan's functional analysis of presidential power.

[192] Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007). Strauss points to a history of disputes about this issue even among Attorney Generals, who are of course presidential appointees. Id. at 697-699.

[193] A similar position was earlier taken by other scholars. *See* Lessig and Sunstein, supra note 191, at 2-3.

[194] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006).

in which Congress specifically gave the President directive power or final power of decision.[195] That indicated, he contended, that Congress did not write statutes on the assumption that silence on this issue implied the existence of directive power.[196] If anything, he argued, Congress seemed to assume the contrary.[197]

Not everyone agreed with Kagan on policy grounds. Peter Strauss argued that directive power "appears rather as a threat to the engine of practical checks and balances that, for more than two centuries, has helped keep American Government on a democratic track."[198] Lisa Heinzerling, based on her administrative experience at EPA, has a very different assessment of presidential administration than Kagan's. In her view, "[t]he system that we have does not, in the run of cases, lead to the kind of energetic and accountable action that Justice Kagan described."[199] "In many cases," Heinzerling wrote with particular reference to the role of OIRA, "it instead leads to stasis and failure of accountability."[200]

Experience thus far with the Trump Administration reinforces concerns about expanding the president's power to force decisions on unwilling agencies.. Accepting Kagan's approach would increase the likelihood that decisions would be made without regard to the views of experts. Given the chaotic situation within the White House and the President's propensity for changing his mind, recognizing directive power would seem unlikely to increase the consistency or coherence of government regulations or to rest on careful adherence to statutory mandates. The Trump track record in the White House does not provide a knockdown argument against Kagan's position, but it does add considerable weight to the cautionary notes about the directive power sounded by Strauss and others.

Kagan may be right that under some presidents an expansive view of the directive power would provide stronger government without undermining the important role of expertise and adherence to the rule of law. But with some other presidents, such as Trump, this perspective may be too optimistic.

It seems a large gamble to give any one individual the power to decide by fiat how the enormous power of the federal government will be deployed across the full range of decisions from surveillance and criminal prosecution of individuals to regulation of entire industries. Allowing dissenting officials the option to force the president's hand, by requiring him to either accede to their decisions or fire them, may provide at least on the margins some check on abuse of power. Yet this modest

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[195] Id. at 276-283.

[196] Id. at 284-291.

[197] Robert Percival also points to the language of the executive orders from Reagan and later presidents directing agencies to perform cost-benefit analysis, which seems to concede that the final decision on regulations resides with the agencies rather than the White House. Percival, supra note 2, at 2487.

[198] Strauss, supra note 192, at 757.

[199] Heinzerling, supra note 162, at 65.

[200] Id.

check can hardly be viewed as destroying the ability of the president to maintain the unity of the executive branch.

B. Presidential Administration and Judicial Deference

The Supreme Court has grappled with, but not conclusively resolved, whether the president's support for a policy should count in favor of the policy during judicial review. Most famously, in the *Chevron* case, the Court grounded deference to agency statutory interpretations on two considerations: Congress's delegation of authority to the agency and the greater political accountability of agencies as compared with courts. But later cases have tended to place greater stress on the delegation argument.

In two other cases, the Court considered changes in agency policy that were clearly prompted by changes in presidential administrations. *State Farm* involved the Reagan Administration's decision to rescind an earlier regulation requiring air bags or passive restraints in new cars.[201] The majority held that the agency's decision was arbitrary and capricious because it had failed to provide an adequately reasoned justification for its action. In dissent, then-Justice Rehnquist argued that the difference in regulatory philosophies of the new president provided a legitimate basis for rethinking the earlier regulation.

More recently, in *Fox Television*,[202] the Court upheld the decision of the FCC to abandon a previous policy, under which it would not penalize "fleeting" use of indecent language by broadcasters. Justice Scalia's opinion for the Court held that the FCC's change in stance was not arbitrary or capricious. In parts of the opinion, he embraced Rehnquist's view of the legitimacy of "political" considerations in regulatory decisions. But those portions of the opinion represented only a plurality.

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[201] Motor Vehicles Manufacturers Association v. State Farm, 463 U.S. 29 (1983). The Court's reasoning is encapsulated in the closing section of Justice White's majority opinion:

> "An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis ..." Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (CADC), cert. denied, 403 U.S. 923, (1971).

Id. at 57. In contrast, Justice Rehnquist, writing for himself and three other dissenters, argued 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. 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.

Id. at 59.

[202] FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2009). *Fox* held that an agency is not as a general matter required to provide a stronger explanation of its decision to change or rescind a rule than it would have had to provide for a new rule, except when it is necessary for an agency to explain why its view of the facts has changed or to take into account reliance interests developed because of the prior rule. Id. at 515.

Kagan argued that presidential involvement should be considered a critical factor in applying the *Chevron* doctrine.[203] For instance, she said, "new administrative interpretations following new presidential elections should provide a reason to think deference appropriate rather than the opposite."[204]

Kagan also largely endorsed Justice Rehnquist's dissent in *State Farm* that an agency should be allowed to rely on the president's preferences in grey areas, provided it did consider "obvious regulatory alternatives" and did not disregard contrary evidence.[205] Other scholars have debated the question of whether application of the arbitrary and capricious doctrine should include deference to White House directives to agencies,[206] or whether on the contrary those directives should be considered to undermine the legitimacy of the agency's action.[207]

Lisa Bressman has argued persuasively that arguments for presidential administration are rooted in the appeal of majoritarianism.[208] Bressman offers a strong normative critique of majoritarianism as a basis for administrative legitimacy, but in the case of President Trump, the majoritarian argument does not even get off the ground. The fact that the President did not receive the vote of a majority of American voters is irrelevant to the legal validity of his election, but it does weaken the argument for deference to presidential views based on the President's claim to represent the national public. And here, too, Trump's case is

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[203] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), held that when Congress has not spoken clearly to an issue, courts should defer to a reasonable agency interpretation of the governing statute. As Kagan explained, this holding was based partly on the greater public accountability of agencies and partly on the presumption that Congress intended them to resolve statutory ambiguities. Kagan, supra note , at 2378.

[204] Id. at 2378.

[205] Id. at 2381.

[206] Kathryn Watts is perhaps the main supporter of Kagan's position. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 Yale L.J. 2 (2009). She does propose an important caveat that the political influence must be open and transparent, id. at 8, and she limits her thesis to "those influences that seek to further policy considerations of public value" as opposed to "those that seek to implement raw politics or partisan politics unconnected in any way to the statutory scheme being implemented." Id. at 9. For a critique of Watts' position, see Seidenfeld, supra note .

[207] Christopher Edley has suggested that the legitimacy of the political dimension of policy making should depend in part on whether diverse political perspectives were considered in the agency decision process. Christorpher F. Edley, Jr., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 199 (1990). So far, there is no indication that this is taking place in the Trump Administration.

[208] In her words,

> That model places administrative policymaking under the direction of the government official who, it is said, is the most responsive to the people.[13] The President represents and answers to a national constituency, which makes him even more responsive to the people as a whole than Congress.

Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 466 (2003).

not wholly unique: President George W. Bush also failed to win the popular vote in his first election; and Bill Clinton had only plurality support in his first election.

Initial experience with the Trump Administration undermines other arguments for basing judicial deference on presidential involvement. Given the detachment of Trump's White House from agency expertise and doubts about its adherence to the rule of law, it is hard to see how the fact that the president supports an action contributes force to the "reasoned explanation" required by the courts. How deferential should courts be to a President who, after having demanded the repeal of legislation structuring much of the healthcare sector for many months, only belatedly came to the realization that healthcare is a complicated subject?[209]

Instead, one might argue that presidential involvement should detract from the deference to be accorded to an agency decision. To the extent that *Chevron* deference rests on a delegation by Congress to an agency, evidence that a decision was made in the White House seems to undermine the case for deference. But presidents can hardly be expected to keep silent about important pending regulatory issues, and agencies cannot be expected to ignore their views. Thus, there is a considerable line-drawing problem in determining when a president has had so much influence on the agency's decision that a court should no longer give the agency's decision the normal amount of judicial deference.[210] Deference doctrines are based on assumptions about the agency – that it was chosen by Congress to implement a law and that it has special expertise – and these assumptions do not apply when it is not the agency itself that has actually made the decision.

An alternative issue based on presidential intervention in an agency's decision would arise when the basis for the White House's action would clearly be impermissible under the governing statute. For instance, the president might direct the agency to reject a proposed action on the basis of cost, in a situation where cost is not a permissible consideration under the statute. That would be a basis for invalidating the agency's decision.[211] The communications in question might well be

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[209] In President Trump's words:

> We have come up with a solution that's really, really I think very good," Trump said at a meeting of the nation's governors at the White House.
>
> Now, I have to tell you, it's an unbelievably complex subject. Nobody knew health care could be so complicated.

Kevin Liptak, *Trump: 'Nobody knew health care could be so complicated'*, CNN (Feb. 28, 2017), available at http://www.cnn.com/2017/02/27/politics/trump-health-care-complicated/index.html.

[210] Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. – (2017)(forthcoming), is the first systematic exploration of the subject of which I am aware.

[211] After first holding that cost was not a factor that EPA could consider in setting National Ambient Air Quality Standards (NAAQSs), Justice Scalia went on to say:

> Respondents' speculation that the EPA is secretly considering the costs of attainment without telling anyone is irrelevant to our interpretive inquiry. If such an

protected by executive privilege, blocking inquiry – but that may not always be true. For instance, a president might announce his views in a tweet or public statement. In determining whether to pursue the issue, the court should take into account the likelihood that the agency would take the communication to be a serious expression of presidential intent, rather than an ill-considered casual remark.

This is not to say that agency decisions are purely technocratic exercises. We all realize, as do courts, that policy is a legitimate part of the decision making process, and that approaches to policy are properly chosen by political appointees. But Kagan's argument was that the simple fact of presidential involvement in a decision should add to the legitimacy of an agency's action. That argument was based, in turn, on assumptions about the operation of the White House and its relationship to agencies that have proved with time to be at best shaky.

C. The Checking Function of the Bureaucracy

In Kagan's article, the virtues of presidential administration are generally set off against a far less rosy view of the bureaucracy, described as having, at best, "somewhat bloodless, technocratic virtues,"[212] while suffering from "bureaucratic inertia in the face of unmet needs and challenges"[213] and "inherent vices (even pathologies), foremost among which are inertia and torpor."[214] But alternative visions are possible. Jon Michaels argues instead that "the independent and much relied-upon" – he might have added, much reviled – "civil service has institutional, cultural, and legal incentives to insist that agency leaders follow the law, embrace prevailing scientific understandings, and refrain from partisan excesses."[215]

Kagan actually provided very little evidence to support her dour appraisal of the bureaucracy, apparently taking the failings of bureaucracy as a matter of

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> allegation could be proved, it would be grounds for vacating the NAAQS, because the Administrator had not followed the law.

Whitman v. American Trucking Ass'ns, 531 U.S. 457, 471 (2001).

[212] Kagan, supra note 2, at 2341.

[213] Id. at 2249.

[214] Id. at 2263.

[215] Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 543 (2015). As Michaels explains, civil service rules and whistleblower protection provide bureaucrats a sturdy platform to defend expertise and deliberative decision making:

> Accordingly, civil servants have broad responsibilities and the legal authority and institutional inclination to resist and redirect agency leaders' intent on shortchanging procedures, ignoring or downplaying congressional directives or scientific findings, or championing unvarnished partisan causes. Civil servants' loyalties generally lie with their professional commitments (as trained biologists, lawyers, engineers, etc.), the programs they advance, and the organizations they serve. And their means of advancement and validation come largely from within the civil 2015 service itself, where expertise is prized and political activism is discouraged.

Id. at 544.

common knowledge. Her vision of an abidingly torpid bureaucracy, lacking in the ability to innovate without a kick from the White House, seems inconsistent with her description of how Clinton sometimes claimed ownership of agency initiatives rather than originating them. She is surely right that bureaucratic inertia exists and that the president may play a role in overcoming it. But as Lisa Heinzerling has pointed out, presidential administration may also be a source of inertia, as bureaucratic initiatives become mired in White House review or are actually vetoed.[216]

Moreover, the marginalization of agency expertise in the Trump Administration may provide a salutary reminder of how central expertise is to the operation of government. Many issues, not just health care, are enormously complicated. A government that tries to operate solely on the basis of the leadership's political instincts without attending to all the complexity will almost inevitably commit serious errors.[217]

I am not the first to consider the potential checking function of the bureaucracy. Neil Katyal has written about the civil service in his analysis of the internal checks and balances within the executive branch.[218] One of those checks is the independence of the Civil Service from direct political influence.[219] In his view, the "modest internal checking function created by bureaucratic overlap and civil-service protections, coupled with reporting requirements, moves the balance away from the regime of nearly pure presidential control toward a middle ground that more closely approximates the separation of powers laced into the fabric of our constitutional order."[220] Although his focus is on Civil Service employees in the national security area, his point seems valid as applied to government career professionals more generally.

Bureaucracy may be too prone to inertia, but inertia can also be a needed check on arbitrary or ill-considered actions. Katyal points out that one "chief

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[216] See Heinzerling, supra note 162.

[217] William Resh presents empirical evidence that institutional competence during the Bush Administration was tied to development of trust between political employees and permanent staff. See William G. Resh, RETHINKING THE ADMINISTRATIVE PRESIDENCY: TRUST, INTELLECTUAL CAPITAL, AND APPOINTEE-CAREERIST RELATIONS IN THE GEORGE W. BUSH ADMINISTRATION 156-158 (2015). Interestingly, Resh suggests that the Obama Administration was less respectful of senior career professionals as it consolidated more authority in White House staff. Id. at 158. If true, this is a trend that seems to have increased during the Trump Administration.

[218] Neal Kumar Katyal, *Internal Separation Of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314 (2006). Speaking of Kagan's advocacy of presidential administration, he pointed out that her argument is best suited for periods of divided government: "[I]t becomes clear that the Kagan thesis depends crucially on oversight by the coordinate legislative branch (typically controlled by a party in opposition to the President). Without that checking function, presidential administration can become an engine of concentrated power." Id. at 2318.

[219] 5 U.S.C. §§2301-2305 establishes the merit system that protects civil servants from political pressure.

[220] Id. at 2346.

advantage of bureaucracy is to maintain the long-term view."[221] As Jennifer Nou observed even before Trump took office, because agency staff are hired on the basis of merit, "they often enter government with professional norms informed by technical or legal training."[222] Consequently, "they are often professionals disposed to defend norms such as scientific integrity and the rule of law."[223]

The ultimate decisions are made by political appointees, but the bureaucracy can play an important role in pushing back against decisions that lack genuine legal or technical justifications.[224] Apart from making their voices heard in internal government discussions, they have other means to push back, including complaints to agency inspectors general, press leaks, and communication with Congress.[225] To take one striking example, military lawyers strongly resisted Bush Administration efforts to limit the hearing rights of detainees.[226]

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[221] Id. at 2344.

[222] Jennifer Nou, *Resistance from Below* (Nov. 16, 2016), http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/.

[223] Id. Further support for this view, from a political science perspective, can be found in Jack H. Knott and Gary J. Miller, *When Ambition Checks Ambition: Bureaucratic Trustees and the Separation of Powers*, 38 AM. REV. PUB. ADMIN. 387 (2008).

[224] Gillian Metzger observed that opposition from the civil service can also work against an agency in terms of judicial review. See Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 445 (2009).

[225] These and other forms of resistance emerged very early in the Trump Administration. See Juliet Eilperin, *Lisa Rein and Marc Fisher, Resistance from within: Federal workers push back against Trump*, WASH. POST (Jan. 31, 2017), available at https://www.washingtonpost.com/politics/resistance-from-within-federal-workers-push-back-against-trump/2017/01/31/c65b110e-e7cb-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.64759424e90f. For instance,

> The State Department has emerged as the nexus of opposition to Trump's refugee policy, in part because it has an official dissent channel where Foreign Service employees can register opposition without fear of reprisals. The channel, formed in 1971, has been used to raise policy objections to the Vietnam War and other conflicts. Several hundred employees signed the dissent cable objecting to Trump's refugee policy.

Id.

[226] See Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617 (2009). In one telling incident, military lawyers went public with their concerns:

> The Pentagon's top uniformed lawyers took issue Thursday with a key part of a White House plan to prosecute terrorism detainees, telling Congress that limiting the suspects' access to evidence could violate treaty obligations. Their testimony to a House committee marked the latest time that military lawyers have publicly challenged Bush administration proposals to keep some evidence — such as classified information — from accused terrorists. In the past, some military officials have expressed concerns that if the U.S. adopts such standards, captured American troops might be treated the same way.

The benefits of a bureaucratic voice in decision-making underpin the importance of what Jody Freeman and Adrian Vermeule have called expertise forcing by courts.[227] In part, this expertise forcing takes the form of an insistence that a court justify its decisions based on the factors relevant under the statute authorizing its actions.[228] But it also involves an anti-circumvention principle, designed to ensure that the agency does not drain the life from a statute's basic policies for ideological reasons.[229] Memorably, they call *Massachusetts v. EPA*,[230] in which the Court overturned the Bush Administration's decision to refrain from regulating greenhouse gases, as "*State Farm* for a new generation"[231] – *State Farm* being a foundational case demanding reasoned explanation of an agency's decisions based on the evidence in the record.[232] The decision-making processes of the Trump Administration, which I described in detail in Part II, make it all the more important for courts to exercise the kind of "hard look" review defined by *State Farm.*[233]

Associated Press, *Military Lawyers Question Bush Plans for Trials* (Sept. 7, 2006), available at http://www.nbcnews.com/id/14717778/ns/us_news-security/t/military-lawyers-question-bush-plan-trials/#.WXTX6NPyt-U.

[227] See Jody Freeman and Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 52-53 (2008). As they recount, *Massachusetts v. EPA* involved a highly politicized decision by the Bush Administration to ignore the view of scientists and refuse to make a finding that greenhouse gases endanger public health and welfare. *Id.* at 53-64. In their view of this and other recent cases, "the Court has seemingly turned away from this benign view of presidential administration toward an older model of administrative law that emphasizes the tension between democratic politics—and in particular political control over line agencies – and technocratic expertise." *Id.* at 71. In their view, "these cases are all to a greater or lesser extent inflected with a worry about executive willingness to cast aside expertise and professional methodologies and procedures in the name of political expediency." Id. at 95.

[228] Id. at 80.

[229] Id. at 87. Although she is averse to expertise forcing, Kathryn Watts accepts what I take to be the core of that approach, an insistence that agency decisions be based on statutorily relevant factors. See Watts, *Presidential Control*, supra note 2, at 731-732.

[230] 549 U.S. 497 (2007) (holding that EPA had statutory authority to regulate greenhouse gases and could choose whether or not to exercise that authority solely on the scientific evidence concerning the risks of climate change).

[231] Freeman and Vermeule, supra note 227, at 96.

[232] See text accompanying notes 201 to 207, supra.

[233] For a discussion of the functions played by hard look review, see Emily Hammond Meazell *Presidential Control, Expertise, and the Deference Dilemma*, 61 Duke L.J. 1763, 1773-1774. Jodi Short has highlighted the link between hard look review and the role of agency expertise and professionalism:

> Hard-look review has encouraged agencies to develop internal constituencies of professionals who are committed to scientific, analytical, and reasoned decision making; and even more importantly, it has given those constituencies some measure of policymaking clout within agency organizations. . . . The fact that they must ultimately justify their decisions on rational grounds gives these professionals a voice in the organization that they might not otherwise have.

VI. Conclusion

I do not want to overstate either the extent of the Kagan article's embrace of presidential activism or the significance of Trump in thinking more generally about the role of the president in our administrative state. Kagan was careful to acknowledge "the continuing roles that Congress, bureaucratic experts, and constituency groups play in administrative governance" and "the need for the continued participation of these actors, in various contexts and for various purposes."[234] She was calling for a substantial shift of the balance toward presidential control, not the complete substitution of politics for expertise. Likewise, based on the Trump experience, I have argued for increasing the voice of the bureaucracy, not the elimination of presidential control in setting priorities and coordinating efforts among different agencies.

The crux of Kagan's argument was the need to augment institutions and legal doctrines supporting centralization of power in the White House. As I have argued, the experience of the Trump Administration has already raised serious questions about the desirability of such a shift. Instead, if anything, we should now be considering whether it would not be wise to shift the balance in the opposite direction.

Similarly, it would be a mistake to make wholesale revisions of doctrine in response to a single president. Doctrines must be designed with a range of possible executive behavior in mind, not on the basis of one presidency. But that range has turned out to be broader than many of us had assumed. The Trump Presidency has highlighted risks to presidential administration that were less evident previously. As a result, we need to recalibrate our expectations about presidential behavior and correspondingly our understanding of the overall functioning of the executive branch. Thus, we may gain a newfound appreciation for some of the institutions and doctrines that may limit presidential power and reinforce the role of those least beloved of all figures, the bureaucrats.

Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1868 (2012).

[234] Kagan, supra note 2, at 2384.