

MIDNIGHT REGULATIONS, JUDICIAL REVIEW, AND THE FORMAL LIMITS OF PRESIDENTIAL RULEMAKING

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On three occasions, administrative agencies complied with orders of new Presidents to delay the effective dates of "midnight regulations" promulgated in the final days of the outgoing administration. Although rulemaking pursuant to presidential directives is increasingly common, the agencies' exclusive reliance on presidential authority in these instances is unusual; the delays thus presented a rare opportunity for judicial review of presidential rulemaking. In this Note, B.J. Sanford argues that the delays were illegal. First, they cannot withstand the traditional "hard look" review of administrative action because they do not contain adequate justifications grounded in the authorizing statute. More importantly, by relying on presidential decree rather than statutory authority, the agencies crossed the thin formal line between legally bounded administrative rulemaking and straightforward legislation, producing a constitutionally unacceptable concentration of arbitrary power. Although the immediate impact of this violation may be small, the consequences of repeated acquiescence to it may be much greater, as even small formal deviations, if not consistently challenged, can threaten the system of dispersed power contemplated by the Constitution.

INTRODUCTION

Less than two hours after the inauguration of President George W. Bush, White House Chief of Staff Andrew Card issued a memorandum to the heads of all executive departments. The memorandum announced the initiation of a government-wide regulatory review, meant to "ensure that the President's appointees have the opportunity to review any new or pending regulations."¹ One of the memorandum's directives ordered agencies to delay for sixty days the effective date of any regulation that had been published in the Federal Register but had not yet taken effect.² This provision was meant to prevent the

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¹ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001); see also Richard W. Stevenson & Robert Pear, To Do: 1. Undo Most Recent Actions of My Predecessor, *N.Y. Times*, Jan. 21, 2001, at A13.

² Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. at 7702.

large number of “midnight regulations” promulgated in the final month of the Clinton administration from taking effect before the new administration decided which ones it wanted to reverse.³

The agencies complied with Card’s Memorandum (Card Memo).⁴ Since the midnight regulations already had been issued in final form, the new administrators had to issue new final rules amending the old rules’ effective dates.⁵ They justified the amendments by citing the Card Memo, stating that the delay was necessary to implement the President’s regulatory review.⁶

The delays passed with little comment from journalists,⁷ scholars,⁸ or members of Congress.⁹ Indeed, observers of administrative rulemaking should have been quite accustomed to this pattern of pres-

³ See Dan Morgan, *Clinton’s Last Regulatory Rush: President Seeks Legacy in Environment, Health, Labor Rules*, Wash. Post, Dec. 6, 2000, at A1; Eric Pianin, *Bush Scrambles to Block Clinton Rush Orders*, Wash. Post, Jan. 21, 2001, at A18.

⁴ See, e.g., *Mitigation of Impacts to Wetlands and Natural Habitat*, 66 Fed. Reg. 8089 (Jan. 29, 2001) (delaying by sixty days Department of Transportation regulation that had been published in Federal Register but had not taken effect yet); *National Medical Support Notice: Delay of Effective Date*, 66 Fed. Reg. 8076 (Jan. 26, 2001) (delaying Department of Labor regulation).

⁵ See *infra* notes 120-23 and accompanying text (arguing that delays of effective date are final agency action); see also, e.g., *National Medical Support Notice: Delay of Effective Date*, 66 Fed. Reg. at 8076 (calling agency action “Final rule”). But see *Clarification of Parole Authority; Delay of Effective Date*, 66 Fed. Reg. 7863, 7863 (Jan. 26, 2001) (calling agency action “Interim rule”).

⁶ See, e.g., *Mitigation of Impacts to Wetlands and Natural Habitat*, 66 Fed. Reg. at 8089; *National Medical Support Notice: Delay of Effective Date*, 66 Fed. Reg. at 8076.

⁷ Journalists noted the delay but did not raise questions about its legal validity. See, e.g., David E. Rosenbaum, *Bush Rules! It’s Good to Be the President*, N.Y. Times, Jan. 28, 2001, at D16; Cindy Skrzycki, *Lining Up to Lobby for Rule Rescission*, Wash. Post, Feb. 6, 2001, at E1. Most public attention has focused on the substantive reversals the Bush administration sought in a small number of the rules. See *infra* note 112 and accompanying text.

⁸ As with the journalists, the few legal scholars who have mentioned the delays have not questioned their legality. See, e.g., Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2319 (2001) (noting operation of “Memorandum for the Heads and Acting Heads of Executive Departments and Agencies” (Card Memo) but not questioning its legal validity); Kathryn J. Kennedy, *The Perilous and Ever-Changing Procedural Rules of Pursuing an ERISA Claims Case*, 70 UMKC L. Rev. 329, 330 n.8 (2001) (same).

⁹ Twenty-two months after the Card Memo was issued, the Senate Governmental Affairs Committee, then chaired by Democratic Senator Joseph Lieberman, released a report on the delays. Staff of the Senate Comm. on Governmental Affairs, 107th Cong., *Rewriting the Rules* (2002) [hereinafter *Senate Report on Rewriting the Rules*], <http://govt-aff.senate.gov/envrollbacksreport.pdf>. In its section on legal concerns, the report does not challenge the substantive sufficiency of the delays themselves—the focus of this Note. Rather, the report objects to agencies’ failure to submit the delays to notice-and-comment procedures, *id.* at 20-25, the most common objection voiced by opponents of midnight-regulation delays, see *infra* notes 89-92, 98-101 and accompanying text. The bulk of the report, moreover, addresses not the delays themselves but the subsequent reversals of three specific rules. See *Senate Report on Rewriting the Rules*, *supra*, at 26-90.

idential directive and agency compliance. Over the past twenty-two years, the number of presidential rulemaking directives has grown exponentially as presidents have sought to ensure that agency-made rules conform to the presidents' own policies.¹⁰ Other actors on the rulemaking scene have been unable to resist this concentration of administrative power in the President's hands.¹¹ But unlike most instances of presidential rulemaking, the Card Memo—and two similar directives during the Reagan administration¹²—spurred agencies to cite the President's authority explicitly for a rule. This departure from normal rulemaking form could have presented courts with a rare opportunity to pass on the legality and legitimacy of the emerging President-regulator.

This Note argues that the delays were illegal and that courts should invalidate such actions if ever attempted again.¹³ The practical significance of this assertion may seem small given the limited impact of the delays.¹⁴ However, the analysis reveals a troubling deficiency in the delays as published—each relies on presidential will instead of statutory mandate. This exclusive focus on presidential authority represents a breach of the thin formal barrier separating administrative rulemaking from straightforward legislation. As such, it threatens to unsettle the distribution of power within the federal government.¹⁵

Part I of this Note reviews the expansion of presidential direction of administrative rulemaking. President Ronald Reagan's initiation of Office of Management and Budget (OMB) review of agency rulemaking elicited much controversy because of its deregulatory orientation. Yet the Reagan administration's claims of authority were modest: White House direction of rulemaking was low-profile, its legislative role was primarily negative, and the administration explicitly disclaimed the authority to substitute the President's judgment for that of the department heads to which Congress delegated rulemaking power. President Bill Clinton, on the other hand, repeatedly asserted his authority to order agencies to make rules. His directives were explicit and visible, and they often ordered the creation of positive law.

¹⁰ See *infra* Part I.A.

¹¹ See *infra* Part I.B.

¹² See *infra* notes 28-36 and accompanying text.

¹³ One delay implemented pursuant to the Card Memo was challenged in *New York v. Abraham*, 199 F. Supp. 2d 145 (S.D.N.Y. 2002). However, the court dismissed the complaint on jurisdictional grounds, finding that the nature of the challenge required that it be filed in a federal court of appeals, rather than in district court. See *infra* notes 124-28 and accompanying text.

¹⁴ Nonetheless, the impact may be significant in some instances. See *infra* notes 124-28 and accompanying text.

¹⁵ See *infra* notes 161-69 and accompanying text.

Indeed, political changes increasingly compel presidents to use rulemaking as an instrument for implementing their policies, while institutional constraints prevent Congress and the courts from resisting expansive claims of presidential authority. Collective action problems—and the need for a supermajority to override a presidential veto—prevent Congress from protecting its institutional interest in maintaining agency adherence to congressional, rather than presidential, priorities. Similarly, courts rarely have the opportunity to pass on the legality of the expansion of presidential rulemaking because of the restriction of judicial review to final agency action and the omission of any reference to the President in the record of presidentially initiated rules.

Part II describes the midnight-regulation memoranda and corresponding agency responses. Those responses fall into two categories: (1) rules that merely cite the President's authority as the basis for the delays and (2) rules that go further by endorsing the policies behind the President's order. Both types of responses lack the aforementioned obstacles to judicial review usually present in presidentially initiated rules: They constitute final agency action and explicitly cite the President's authority. Furthermore, the delays' substantive impact is sufficient to merit "hard look" review under the Administrative Procedure Act (APA).¹⁶

Part III argues that the delays were illegal. As a matter of administrative law doctrine, they were arbitrary and capricious because they did not provide adequate reasons for their promulgation and because they did not rely on factors that Congress contemplated when it delegated its legislative power.¹⁷ Therefore, a reviewing court should invalidate such delays if they ever are attempted again.

This analysis highlights the formal limits of presidential rulemaking within the constitutional scheme. Courts long have distinguished between executive acts that are required by statute and those that are discretionary, political, and unreviewable.¹⁸ Agency rulemaking is a hybrid of the two.¹⁹ The *form* of agency rules—their rational and stat-

¹⁶ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). For an explanation of "hard look" review, see *infra* notes 132-44 and accompanying text.

¹⁷ In other words, they fail "hard look" review. See *infra* Part III.A.

¹⁸ See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (suggesting that President has discretion to exercise political powers in submitting matters to Congress); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803) (stating that matters left by Constitution to executive discretion constitute unreviewable political questions); see also 5 U.S.C. § 701 (2000) (exempting from judicial review "agency action . . . committed to agency discretion by law").

¹⁹ See *infra* notes 152-53 and accompanying text.

ute-centered justifications—reflects this hybrid nature. A departure from that form, even without significant substantive consequences, threatens the boundary between legally bounded policymaking and pure political will. Shorn of its grounding in statutory delegation, rulemaking becomes formally indistinguishable from legislating.²⁰

By citing exclusively to the President's will, the delays signaled a new phase in the President's steady concentration of administrative power. Widespread acquiescence to such claims of authority could turn them into constitutional fact, either by obtaining the explicit approval of the Supreme Court or by altering the "psychology of government"—the customs of directive and compliance that govern daily interactions within the administrative state.²¹ In this context, failure to insist on rational and statute-centered explanations for even minor rules could erode the system of dispersed power contemplated by the Constitution.²²

I

THE EXPANSION OF PRESIDENTIAL RULEMAKING

This Part reviews the expansion of presidential direction of rulemaking. Part I.A chronicles the evolution of White House participation in rulemaking from a primarily negative, behind-the-scenes obstacle to regulation into a bold assertion of positive power. Part I.B explains why Congress and the courts have been powerless to resist this expanding presidential authority.

A. *The Expanding Presidential Directive Power*

Early attempts to assert White House control over rulemaking emphasized coordination and consultation.²³ For example, President Richard Nixon instituted a program of "Quality of Life" review that

²⁰ As the preceding paragraph reveals, this Note is consciously formalistic. Its underlying premise is that the observance or nonobservance of forms communicates beliefs about the distribution of power that can turn into constitutional fact if other actors acquiesce. See *infra* text accompanying notes 159-63.

²¹ See *infra* notes 161-62 and accompanying text.

²² This Note does not address the desirability of presidential rulemaking within the traditional constraints of administrative law. Rather, it seeks to highlight the way in which the midnight-regulation delays differ in form from the traditional products of presidential intervention and to evaluate the consequences of that difference for the distribution of power within the federal government.

²³ Widespread administrative rulemaking began after World War II, when the expanding variety and complexity of regulations outgrew the old adjudication-based model. Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 Harv. L. Rev. 1075, 1077-79 (1986). The large number of environmental, health, and safety statutes passed in the 1970s led to a "regulation explosion," at which time early efforts at presidential control of rulemaking also appeared. *Id.*

directed agencies to circulate certain proposed environmental, consumer safety, and public health rules to other agencies for review and comment.²⁴ President Gerald Ford ordered agencies to consider the impact of new rules on inflation.²⁵ President Jimmy Carter instructed agencies to submit analyses of major rules to a "Regulatory Analysis Review Group" in order to encourage more rigorous economic analysis.²⁶ However, in all these instances, the agencies—and not the White House—had the final say.²⁷

1. *The Advent of OMB Review*

Shortly after taking office, President Reagan created a new mechanism for White House supervision of administrative rulemaking.²⁸ Executive Order 12,291 instructed agencies to prepare a Regulatory Impact Analysis for every major rule, examining its potential costs and benefits.²⁹ It also provided agencies with general substantive guidelines for evaluating new rules.³⁰ Finally, it ordered agencies to submit every major rule to OMB for review before promulgation.³¹

²⁴ Kagan, *supra* note 8, at 2276; Richard H. Pildes & Cass R. Sunstein, Reinventing the Regulatory State, 62 U. Chi. L. Rev. 1, 13-14 (1995).

²⁵ Kagan, *supra* note 8, at 2276; Pildes & Sunstein, *supra* note 24, at 14.

²⁶ Kagan, *supra* note 8, at 2276-77; Pildes & Sunstein, *supra* note 24, at 14.

²⁷ Kagan, *supra* note 8, at 2276-77.

²⁸ See Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988). Executive Order 12,291 and its system of Office of Management and Budget (OMB) review received much commentary and criticism throughout the Reagan and first Bush administrations. See generally Harold H. Bruff, Presidential Management of Agency Rulemaking, 57 Geo. Wash. L. Rev. 533 (1989) (arguing that presidential oversight of rulemaking has place in administrative state but needs additional controls); DeMuth & Ginsburg, *supra* note 23 (explaining and defending OMB review); Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 Am. U. L. Rev. 443 (1987) (urging Congress to do more to limit OMB influence); Alan B. Morrison, OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation, 99 Harv. L. Rev. 1059 (1986) (attacking wisdom, but not legality, of OMB review); Robert V. Percival, Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency, Law & Contemp. Probs., Autumn 1991, at 127 [hereinafter Percival, Checks Without Balance] (criticizing OMB review of environmental regulations); Robert V. Percival, Rediscovering the Limits of the Regulatory Review Authority of the Office of Management and Budget, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,017 (1987) (maintaining that court decisions and congressional oversight are important to keep OMB review within legal limits); Peter L. Strauss & Cass R. Sunstein, The Role of the President and OMB in Informal Rulemaking, 38 Admin. L. Rev. 181 (1986) (contending that OMB review is beneficial and facially legal, while proposing some changes).

²⁹ Exec. Order No. 12,291, 3 C.F.R. at 128.

³⁰ See *id.* (requiring agencies to evaluate new rules using cost-benefit analysis).

³¹ *Id.*

OMB used this review power to force changes in rules and make them more consistent with the administration's deregulatory philosophy.³²

Executive Order 12,291 created much controversy,³³ but its formal claims of authority were modest. It required agencies to obey its mandates only "to the extent permitted by law."³⁴ In an opinion approving the order, the Department of Justice's Office of Legal Counsel emphasized that the President's power was only to "supervise" rulemaking—he could not displace the discretion committed to agency officials by statute.³⁵ Indeed, such a claim of directive authority was unnecessary. As long as the President's political appointees were unwilling to disobey him by promulgating rules over OMB's objections, OMB could use its powers of delay to force agencies to implement the administration's desired changes.³⁶

Thus, the White House's power under Executive Order 12,291 was primarily negative: The agencies initiated rules pursuant to their own statutory mandate; the White House then used its power to delay the rules and negotiate changes. This suited an administration that viewed its role as protecting the economy from agencies bent on overregulation.³⁷

President Clinton retained OMB review when he assumed office, but he modified it in several respects.³⁸ His reforms made the review process more open³⁹ and relaxed the required cost-benefit analysis.⁴⁰ However, Clinton's reforms also introduced the first claim of presidential authority to direct agency officials in the exercise of their stat-

³² See Bruff, *supra* note 28, at 559-61 (describing OMB review process as "[b]argaining in the Shadow of Presidential Power").

³³ See *supra* note 28.

³⁴ See Exec. Order No. 12,291, 3 C.F.R. at 128.

³⁵ Proposed Executive Order "Federal Regulation," 5 Op. Off. Legal Counsel 59 (1981). Nor did observers believe Reagan claimed such power. See Pildes & Sunstein, *supra* note 24, at 24-26 (stating that Presidents Ronald Reagan and George H.W. Bush did not challenge "conventional view" that final decision rests with agency); see also Percival, *Checks Without Balance*, *supra* note 28, at 196 (noting that supporters of OMB review argue that "executive orders are carefully structured to preserve their facial legality").

³⁶ In 1986, OMB could cite no instances of agency disobedience that were not due either to court order or appeal to the President. Percival, *Checks Without Balance*, *supra* note 28, at 150.

³⁷ See, e.g., Clyde Farnsworth, *Reagan Signs Order to Curb Regulations*, N.Y. Times, Feb. 18, 1981, at D13.

³⁸ See Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000). For analyses of the Clinton version of OMB review, see Pildes & Sunstein, *supra* note 24, at 17; Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 Ark. L. Rev. 161, 174-76 (1995); Peter L. Strauss, *Presidential Rulemaking*, 72 Chi.-Kent L. Rev. 965, 985 (1997).

³⁹ See Pildes & Sunstein, *supra* note 24, at 22-23.

⁴⁰ The Clinton order instructed agencies to include "distributive impacts" and "equity" in their cost-benefit analyses. Exec. Order No. 12,866, 3 C.F.R. at 639.

utorily delegated rulemaking power. His order established a process whereby the President or Vice President could resolve disputes between OMB and an agency.⁴¹ This implies that the President can order the agency to make the changes OMB seeks and expect the agency to obey.

2. *Clinton's Presidential Directives*

While the Clinton administration continued OMB review, such review was overshadowed by an even more powerful tool for presidential rulemaking—the directive.⁴² Clinton's directives usually took the form of memoranda to the agency heads, ordering them to take particular actions within their statutory discretion, including the initiation of rulemaking.⁴³ By one count, Clinton issued 107 such directives, compared with thirteen issued by Presidents Ronald Reagan and George H.W. Bush combined.⁴⁴ They were often quite detailed⁴⁵ and covered a broad range of topics⁴⁶ from youth smoking⁴⁷ to paid parental leave.⁴⁸

Directives formed a “central part of [Clinton's] governing strategy,”⁴⁹ particularly after the Republicans took control of Congress in

⁴¹ Id. at 648-49; see Kagan, *supra* note 8, at 2288-90; Pildes & Sunstein, *supra* note 24, at 26-27.

⁴² This subsection relies heavily on Kagan, *supra* note 8. Professor Kagan, former chief domestic policy adviser in the Clinton White House, has argued that President Clinton expanded his control over the administrative state in three ways: (1) by continuing OMB review in a modified form; (2) by issuing directives ordering agency action; and (3) by appropriating agency action after the fact. See Kagan, *supra* note 8, at 2284-2303. This Note is concerned primarily with the second method—presidential directives.

⁴³ See, e.g., Memorandum on Clean Water Protection, 1 Pub. Papers 857 (May 29, 1999) (directing EPA Administrator and Secretaries of Agriculture and Interior to adopt rules protecting nation's waters). Historically, presidential orders have dealt with the internal operations of the federal government, such as public lands and government contracts. Clinton's directives were notable because they addressed regulation of parties outside of government. Kagan, *supra* note 8, at 2293.

⁴⁴ Kagan, *supra* note 8, at 2294.

⁴⁵ See id. at 2295 (citing, e.g., Memorandum on the Safety of Imported Foods, 2 Pub. Papers 1129, 1129-30 (July 3, 1999)).

⁴⁶ See, e.g., Memorandum on Carbon Dioxide Emissions Reporting, 1 Pub. Papers 561 (Apr. 15, 1999); Memorandum on Hate Crimes in Schools and College Campuses, 1 Pub. Papers 505 (Apr. 6, 1999); Memorandum on the Health Care “Consumer Bill of Rights and Responsibilities,” 2 Pub. Papers 1621 (Nov. 20, 1997); Memorandum on Increasing Seatbelt Use, 1 Pub. Papers 71 (Jan. 23, 1997).

⁴⁷ See The President's News Conference, 2 Pub. Papers 1237 (Aug. 10, 1995) (“authorizing” FDA to propose rules to prevent youth smoking).

⁴⁸ See Memorandum on New Tools to Help Parents Balance Work and Family, 1 Pub. Papers 841 (May 24, 1999) (directing Secretary of Labor to propose rules allowing states to use unemployment insurance to help parents on leave after birth of child).

⁴⁹ Kagan, *supra* note 8, at 2295-96.

1995.⁵⁰ With little hope of passing legislative initiatives, Clinton used the directives to implement his agenda incrementally while projecting the image of a President energetically engaging the machinery of government to solve national problems.⁵¹ Although some directives merely ratified initiatives that agencies were already planning, many served to spur new initiatives that were not on the rulemakers' agendas.⁵²

The Clinton directives differed from Reagan-era OMB review in several respects. First, while OMB review only posed an obstacle to rules that emerged from the agencies, the Clinton directives affirmatively spurred the creation of rules consistent with the President's policies. Second, while OMB review operated quietly—almost secretly⁵³—under Reagan, Clinton often announced his directives with great fanfare. Indeed, publicity for the President was one of the goals of the directives strategy.⁵⁴

Most importantly, unlike Reagan, who disclaimed any authority to displace the discretion committed by statute to the heads of the agencies,⁵⁵ Clinton explicitly asserted his power to do just that. His announcements were replete with language of authority and command;⁵⁶ he spoke of proposed rules as if they essentially were consummated, even before they went through the notice-and-comment

⁵⁰ See *id.* at 2312.

⁵¹ See *id.* at 2311-13.

⁵² See *id.* at 2297-98.

⁵³ The secrecy of the Reagan version of OMB rulemaking was at the core of many criticisms of Executive Order 12,291. See Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 *Va. J. Nat. Resources L.* 1, 31-35 (1984); Pildes & Sunstein, *supra* note 24, at 5.

⁵⁴ Kagan, *supra* note 8, at 2313.

⁵⁵ See *supra* notes 34-36 and accompanying text.

⁵⁶ For example, in his Youth Smoking Directive, the President declared:

Today I am announcing broad executive action to protect the young people of the United States from the awful dangers of tobacco. . . .

. . . .

Therefore, by executive authority, I will restrict sharply the advertising, promotion, distribution, and marketing of cigarettes to teenagers. . . .

. . . .

So today I am authorizing the Food and Drug Administration to initiate a broad series of steps all designed to stop sales and marketing of cigarettes and smokeless tobacco to children.

The President's News Conference, 2 *Pub. Papers* 1237, 1237 (Aug. 10, 1995). Similarly, in his Parental Leave Directive, *supra* note 48, the President stated: "I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways of using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child." Memorandum on New Tools to Help Parents Balance Work and Family, 1 *Pub. Papers* 841, 841 (May 24, 1999).

procedures required by the APA.⁵⁷ In fact, the final rules were often little changed from the President's directive.⁵⁸ Clinton thus transformed presidential direction of rulemaking into an overt claim of authority to legislate anywhere within the broad areas of policymaking that Congress had delegated to the administrative state.

B. The Irresistibility of Presidential Rulemaking

The partisan gridlock that prevails on Capitol Hill makes rulemaking directives attractive to presidents seeking to implement their policies.⁵⁹ Broad statutory delegations to administrative agencies give presidents ample room to shift public policy in their own ideological direction while still plausibly claiming to be "executing the laws."⁶⁰ As this Section will demonstrate, institutional limitations prevent Congress and the courts from resisting this accumulation of power.

1. Congress

Congressional resistance to presidential rulemaking is extremely difficult both on a wholesale level and with respect to particular substantive issues. Wholesale regulation of presidential rulemaking is virtually impossible. Congress probably cannot forbid presidents from communicating with executive officers⁶¹ nor from demanding that the officers communicate with them.⁶² If the agency heads obey the President, it is because of loyalty, ideological kinship, and the threat of removal⁶³—forces with which Congress is either unable or unwilling to interfere.⁶⁴ Thus, as long as executive officers possess discretion, it

⁵⁷ Kagan, *supra* note 8, at 2284. The Administrative Procedure Act (APA) requires agencies to publish proposed rules in the Federal Register for a period of public comment before promulgation. See 5 U.S.C. § 553 (2000).

⁵⁸ See Kagan, *supra* note 8, at 2283.

⁵⁹ See *id.* at 2311-13.

⁶⁰ See Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. Econ. & Org. 132, 143 (1999) (describing extent of President's broad discretion in implementing statutes).

⁶¹ See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 640-66 (1984) (arguing that Constitution restricts Congress's power to structure relationships within executive branch).

⁶² See U.S. Const. art. II, § 2 (stating that President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices"); see also Strauss & Sunstein, *supra* note 28, at 197.

⁶³ See Kagan, *supra* note 8, at 2298; Strauss & Sunstein, *supra* note 28, at 198.

⁶⁴ Congress could interfere with the removal power by making an agency "independent." See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (holding that Congress can restrict President's power to remove official with quasi-legislative or quasi-judicial function). Indeed, neither OMB review nor presidential directives have been aimed at

is nearly impossible to prevent the President from influencing that discretion.

On specific issues, Congress faces severe collective-action problems in resisting presidential authority.⁶⁵ Party loyalty and constituent commitments often prevent members of Congress from acting collectively to protect their institutional interests. Even when a member's party or constituents oppose a presidential action, the member might gain as much political benefit from complaint as from action, without incurring the substantial costs of organizing collective resistance. This problem is compounded by the need to muster a two-thirds majority to overcome a likely presidential veto.⁶⁶

2. *The Courts*

The courts also face formidable obstacles to resisting presidential directive power. The APA only allows courts to review "final agency action,"⁶⁷ so interested parties cannot challenge White House involvement before the agency issues its rule. For example, unless faced with a statutory deadline, a court cannot order OMB to approve a rule for publication.⁶⁸ Nor can a court directly review the legal validity of presidential directives.⁶⁹

Once a rule has been promulgated, courts still cannot review presidential involvement because such involvement is almost never reflected in the rulemaking record.⁷⁰ Agencies justify the President's rules the same way they justify other rules: with "the usual mix of scientific and legal justification for 'expert' action undertaken in a contested public policy space, to achieve statutory ends assigned to

independent agencies. See Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982) (exempting independent agencies), reprinted in 5 U.S.C. § 601 (1988); Kagan, *supra* note 8, at 2308-09 (noting that Clinton did not direct his techniques of administrative control at independent agencies). However, because of the declining faith in neutral expertise as a basis for administration, Congress has created almost no new independent agencies since the Great Society and has closed several existing ones. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1210 (2000).

⁶⁵ See Moe & Howell, *supra* note 60, at 144.

⁶⁶ See *id.* at 139-40.

⁶⁷ 5 U.S.C. § 704 (2000).

⁶⁸ Cf. *Env'tl. Def. Fund v. Thomas*, 627 F. Supp. 566, 571 (D.D.C. 1986) (ordering EPA to issue rule over OMB's objection when faced with statutory deadline). In a somewhat perplexing ruling, the court also enjoined OMB from delaying the regulation past the deadline, despite the fact that Executive Order 12,291 exempts rules facing statutory or judicial deadline. See Exec. Order No. 12,291, 3 C.F.R. at 133.

⁶⁹ See *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992) (holding that President is not agency under APA).

⁷⁰ See Kagan, *supra* note 8, at 2283; Strauss, *supra* note 38, at 966.

particular agencies for implementation.”⁷¹ Indeed, even when invited by petitioners, courts have declined to decide the question of presidential involvement, preferring to judge the validity of such rules on the basis of the record.⁷²

The most dramatic example of this phenomenon lies in the FDA’s failed attempt to promulgate rules asserting jurisdiction over the regulation of tobacco. These rules, announced in a presidential directive, constituted a major initiative of the Clinton presidency.⁷³ Yet the rules barely mentioned the President,⁷⁴ and the Supreme Court opinion invalidating them did not refer to him at all.⁷⁵ Thus, although courts can stop specific regulatory initiatives if the initiatives fail on their own terms, courts never have the chance to rule on presidential rulemaking, even when it is at its boldest and most far-reaching.

II

REVIEWABLE AT LAST: THE MIDNIGHT-REGULATION DELAYS

This Part considers the midnight-regulation orders and the agencies’ responses to them. Part II.A describes each of the three orders, the nature of agency responses, and the reaction—if any—from observers and courts. Part II.B argues that a court could have reviewed the delays under the APA’s judicial review provisions.

A. *The Midnight-Regulation Orders*

On three occasions, Presidents have ordered agencies to delay the effective dates of regulations passed by an outgoing administration. Reagan ordered such a delay immediately upon entering office.⁷⁶ He then ordered a further delay as part of the implementation of Executive Order 12,291.⁷⁷ Finally, nearly twenty years later,

⁷¹ Strauss, *supra* note 38, at 966; see also Kagan, *supra* note 8, at 2283.

⁷² See *Pub. Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1507 (D.C. Cir. 1986) (“Since we have determined that [the rule] cannot withstand our statutory review, we have no occasion to reach the difficult constitutional questions presented by OMB’s participation in this episode.”); *Sierra Club v. Costle*, 657 F.2d 298, 407-08 (D.C. Cir. 1981) (refusing to require docketing of presidential involvement in rulemaking record because “any rule issued here with or without White House assistance must have the requisite *factual support* in the rulemaking record”).

⁷³ See Kagan, *supra* note 8, at 2283.

⁷⁴ See *Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents*, 61 Fed. Reg. 44,396 (Aug. 28, 1996).

⁷⁵ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (ruling that regulating tobacco is outside FDA’s statutory authority).

⁷⁶ See *infra* notes 80-92 and accompanying text.

⁷⁷ See *infra* notes 93-101 and accompanying text.

George W. Bush authorized the release of the Card Memo.⁷⁸ This Section considers each in turn.

1. *The Reagan Order*

Knowing it was about to be succeeded by an administration hostile to regulation,⁷⁹ the Carter administration mounted a last-minute push to publish new rules in the final month of its term in office.⁸⁰ Rather than allow those midnight regulations to become effective, the new President issued a memorandum to the heads of the executive departments ordering them to delay the new rules.⁸¹ The order instructed agencies to amend any rule scheduled to take effect within sixty days, postponing its effective date until the sixty-day period had elapsed.⁸² The agencies were to obey only "to the extent permitted by law," and the order exempted rules facing judicial and statutory deadlines.⁸³

The memorandum gave a clear—and probably honest—explanation for the delays: The President was in the process of developing a system of regulatory review—the future Executive Order 12,291. He wanted to subject the Carter rules to the new review process out of fear that "many of the prior Administration's last-minute decisions . . . would increase rather than relieve the current burden of restrictive regulation."⁸⁴ Adding a jab at the Carter administration's economic policies, the order continued, "This review is especially necessary in the economic climate we have inherited."⁸⁵

⁷⁸ See *infra* notes 103-12 and accompanying text.

⁷⁹ See Merrill Brown, *Regulatory 'Balance' May Shift to Dismantlers*, Wash. Post, Jan. 11, 1981, at L5.

⁸⁰ Philip J. Hilts, *Agencies Rush Rules to Beat Inaugural Gun*, Wash. Post, Jan. 18, 1981, at A14. Although Republicans accused both the Carter and Clinton administrations of publishing rushed and poorly thought-out rules, many of the midnight regulations had been planned for months or years. See *id.*; Morgan, *supra* note 3. For a defense of midnight regulations and other forms of "agency burrowing," see generally Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. Rev. 557 (2003).

⁸¹ Memorandum of January 29, 1981: Postponement of Pending Regulations, 46 Fed. Reg. 11,227 (Feb. 6, 1981).

⁸² *Id.* at 11,227. The memorandum also ordered agencies to refrain from promulgating any proposed rules during the sixty-day period. *Id.*

⁸³ *Id.* The memorandum also exempted rules related to military and foreign affairs, rules issued after formal rulemaking proceedings under 5 U.S.C. §§ 556-557 (2000), or regulations addressing emergency situations. Memorandum of January 29, 1981: Postponement of Pending Regulations, 46 Fed. Reg. at 11,227.

⁸⁴ Memorandum of January 29, 1981: Postponement of Pending Regulations, 46 Fed. Reg. at 11,227.

⁸⁵ *Id.*

Agencies delayed dozens of regulations in response to the order.⁸⁶ Some agencies merely cited the order as the reason for the delay.⁸⁷ Others both cited the order and implicitly or explicitly endorsed the policies behind it. The Secretary of Transportation gave the most elaborate justification. After reiterating the explanation given by the order itself, the Secretary wrote:

The Department of Transportation shares the President's goals and will do all in its power to comply with the spirit as well as the letter of the President's memorandum. Consistent with this view, I am by this notice postponing . . . the effective day of all Department of Transportation rules covered by the President's directive. . . .

. . . .
[T]he Department realizes that the postponement of pending regulations may not be viewed by certain persons to be in their best interests.

However, the Department is convinced that the economic condition of the Nation is such that the government must rethink the need and burden of each of the below listed regulations. For a new Administration and any new Department head to accomplish this objective effectively, some time is needed for adequate review. . . . [T]he Department is convinced that good cause exists for postponing for up to 60 days the effective dates of the covered pending regulations and that the end result of such a delay—a more cohesive and effective regulatory program—is in the public interest.⁸⁸

No one questioned the substantive sufficiency of either type of agency response. The White House did submit the order to the Office of Legal Counsel (OLC) for an opinion on its legality.⁸⁹ However, as with most challenges to the midnight-regulation memoranda, the OLC focused on whether the agencies could dispense with the APA notice-

⁸⁶ See, e.g., *Deferral of Effective Date of Regulations and Change of Date in Notification*, 46 Fed. Reg. 12,970 (Feb. 19, 1981) (delaying Pension Benefit Guaranty Corporation regulations); *Deferral of Effective Date for Revenue Sharing Regulations*, 46 Fed. Reg. 10,908 (Feb. 5, 1981) (delaying Department of Treasury regulations); *Amendments of Effective Date of Part 125 and Amendments Adopted in Relation to Part 125*, 46 Fed. Reg. 10,705 (Feb. 4, 1981) (delaying FAA regulations).

⁸⁷ See, e.g., *National Forest Timber Sales; Export and Substitution Restrictions*, 46 Fed. Reg. 10,497 (Feb. 3, 1981) ("Pursuant to President Reagan's memorandum of January 29, 1981, on postponement of pending regulations, the effective date of these regulations is being deferred until March 30, 1981.").

⁸⁸ *Postponement of Pending Regulations*, 46 Fed. Reg. 10,706, 10,706-07 (Dep't Transp. Feb. 4, 1981). While most agencies that cited to the President's policies did not endorse them explicitly by saying "the agency shares the President's goals," they implicitly endorsed them by reiterating them when explaining the delay. See, e.g., *Completely Denatured Alcohol Formula No. 20; Deferral of Effective Date*, 46 Fed. Reg. 12,494 (Feb. 17, 1981).

⁸⁹ See *Presidential Memorandum Delaying Proposed and Pending Regulations*, 5 Op. Off. Legal Counsel 55 (1981).

and-comment requirement in issuing the delays.⁹⁰ The OLC decided the agencies could,⁹¹ and its opinion dismissed the substantive issue with a brief conclusion: "A statement of reasons for the deferral should . . . be provided. For this purpose a reference to the President's Memorandum should be sufficient in most cases."⁹²

Not only did the substantive sufficiency go untested within the administration, but nobody challenged the delays in court. This may be because the delays were so brief. Observers were soon distracted by the much more extensive delays ordered by Executive Order 12,291.

2. *Executive Order 12,291*

As promised, Reagan issued Executive Order 12,291—creating the system of OMB review—in February of 1981. However, some of the delayed midnight regulations would take effect before OMB had a chance to review them. Therefore, section 7 of Executive Order 12,291 instructed agencies to further delay the effective date of "major" regulations "[t]o the extent necessary to permit reconsideration in accordance with this Order."⁹³ As with the earlier order, Executive Order 12,291 exempted "rules that cannot legally be postponed or suspended."⁹⁴

Once again, the agencies complied, with most merely citing the order's authority.⁹⁵ The delays pursuant to Executive Order 12,291 had a much greater impact than the earlier set of delays. For instance, several rules were delayed "indefinitely."⁹⁶ In some cases, the agen-

⁹⁰ Id. The APA allows agencies to dispense with notice-and-comment when, inter alia, they find that "good cause" exists to do so. 5 U.S.C. § 553(b)(3)(B) (2000). However, whether the need to delay a regulation pursuant to a presidential order constitutes "good cause" depends on whether the presidential order is a valid basis for the delay. Thus, the answer to the procedural question depends on the substantive one. This Note treats the substantive question as paramount.

⁹¹ Presidential Memorandum Delaying Proposed and Pending Regulations, 5 Op. Off. Legal Counsel at 58.

⁹² Id. at 57 (citation omitted). The Office of Legal Counsel (OLC) did assert the President's power to direct agency officials in exercising their statutory discretion, id. at 56, but it acknowledged that the rules still would have to conform to the law.

⁹³ See Exec. Order No. 12,291, 3 C.F.R. 127, 131 (1982), reprinted in 5 U.S.C. § 601 (1988).

⁹⁴ Id. at 132.

⁹⁵ See, e.g., Revision and Redesignation of Section 502 Rural Housing Loan Policies, Procedures, and Authorizations; Postponement of Effective Date, 46 Fed. Reg. 17,753 (Mar. 20, 1981).

⁹⁶ See, e.g., Deferral of Effective Date for Revenue Sharing Regulations, 46 Fed. Reg. 31,409 (June 16, 1981).

cies proceeded with substantive reversal of the Carter rule without ever allowing it to take effect.⁹⁷

However, as before, no one focused on the substantive validity of the delays, only on the propriety of dispensing with notice-and-comment procedures. In *Natural Resources Defense Council, Inc. v. EPA*,⁹⁸ a challenge to the delay of an EPA rule, the petitioners did not even argue that the delay was arbitrary and capricious. The court invalidated the regulation because the agency failed to follow notice-and-comment procedures,⁹⁹ procedures that would have prevented it from meeting the suspension deadline imposed by the executive order. The court avoided ruling on the legal validity of reliance on Executive Order 12,291.¹⁰⁰ The court reasoned that, since Executive Order 12,291 exempted rules “that cannot be legally postponed,”¹⁰¹ it could not conflict with the procedural requirements of the APA.

3. *The Card Memo*

The routine character that presidential directives assumed during the Clinton years manifests itself in the relative informality of the Card Memo. Comparisons to the first Reagan order are instructive. First, while Reagan personally signed the memorandum authorizing the delays,¹⁰² Bush merely authorized his Chief of Staff to circulate a memorandum announcing them.¹⁰³ Second, the Reagan administration sought an OLC opinion before issuing its order,¹⁰⁴ whereas the Card Memo was issued less than two hours after the President took the oath of office.¹⁰⁵ Third, the Reagan order articulated arguably neutral, public-minded explanations for the delays it ordered.¹⁰⁶ In contrast, the asserted purpose of the Card Memo’s delays was “to ensure that the President’s appointees have the opportunity to review any new or pending regulations.”¹⁰⁷ The Card Memo thus seemed to

⁹⁷ See, e.g., *Withdrawal of Regulations; Buses*, 46 Fed. Reg. 19,270 (proposed March 30, 1981).

⁹⁸ 683 F.2d 752 (3d Cir. 1982).

⁹⁹ See *id.* at 764-67.

¹⁰⁰ See *id.* at 765-67.

¹⁰¹ *Id.* at 755. For a list of legal postponements, see *supra* note 83 and accompanying text.

¹⁰² See *supra* note 81 and accompanying text.

¹⁰³ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702, 7702 (Jan. 24, 2001).

¹⁰⁴ See *supra* note 89 and accompanying text.

¹⁰⁵ See *supra* note 1.

¹⁰⁶ See *supra* notes 84-85 and accompanying text.

¹⁰⁷ Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. at 7702.

suggest that mere conformance to the President's policy preferences is a valid basis for administrative rulemaking.

In complying with the order, the agencies quickly adopted a uniform explanation.¹⁰⁸ The explanation read:

In accordance with the memorandum of January 20, 2001, from the Assistant to the President and Chief of Staff, . . . this action temporarily delays for 60 days the effective date of the rule The temporary 60-day delay in effective date is necessary to give Department officials the opportunity for further review and consideration of new regulations, consistent with the Assistant to the President's memorandum¹⁰⁹

This rationale is most similar to the first type of Reagan explanation—one relying on the President's authority without articulating or endorsing the reasons for the President's order.¹¹⁰ Indeed, given the thin justification provided by the Card Memo, agencies obeying the order had little choice but to cite the President's will.

Journalists and scholars have noted the delays ordered by the Card Memo but have not contested their legality.¹¹¹ Understandably, observers and participants have focused more attention on the small number of midnight regulations that the new administration subsequently attempted to reverse.¹¹² However, the delays merit attention because they present a rare opportunity to subject the assertion of presidential directive power to the lens of judicial review.

B. The Reviewability of the Midnight-Regulation Delays

The rules delaying the midnight regulations lack the obstacles to judicial review usually present in regulations issued pursuant to presi-

¹⁰⁸ The OMB provided agencies with a "model notice" to publish in the Federal Register. Senate Report on Rewriting the Rules, *supra* note 9, at 18 & nn.23-24.

¹⁰⁹ *Id.* at 18 n.24. For an example of an agency's use of the model notice, see Special Regulations; Areas of the National Park System: Delay of Effective Date, 66 Fed. Reg. 8,366 (Jan. 31, 2001).

¹¹⁰ See *supra* note 87 and accompanying text.

¹¹¹ See *supra* notes 7-8 and accompanying text.

¹¹² See, e.g., Eric Pianin & Juliet Eilperin, House Backs Arsenic Rule: Measure Would Restore Standard for Water Suspended by Bush, *Wash. Post*, July 28, 2001, at A1 (discussing resistance of Congress to Bush administration's attempts to "roll back environmental protections"). Of the ninety regulations delayed by the Card Memo, one was withdrawn, three were withdrawn and replaced, and nine were modified as of January 2002. Senate Report on Rewriting the Rules, *supra* note 9, at 17 (citing Letter from Victor S. Rezendes, Managing Director, Strategic Issues, U.S. General Accounting Office, to Henry A. Waxman, Ranking Minority Member, House of Representatives, Committee on Governmental Affairs, and Joseph I. Lieberman, Chairman, Committee on Governmental Affairs, Senate 8-9 (GAO-02-370R, Feb. 15, 2002) (regarding "Regulatory Review: Delay of Effective Dates of Final Rules Subject to the Administration's January 20, 2001, Memorandum"))).

dential directives. Most importantly, they explicitly cite either presidential authority or presidential policies as the sole basis for amending a rule. This contrasts sharply with rules issued pursuant to more substantial directives, which usually refer to factors related to the agency's statutory mandate.¹¹³

In addition, the delays were neither procedural, interim, nor inconsequential for the purposes of judicial review. First, at least two circuit courts have ruled that the effective date of a rule is a substantive provision of that rule; thus, any delay constitutes substantive amendment within the meaning of the APA.¹¹⁴ The courts reasoned that without an effective date, a rule has no "future effect,"¹¹⁵ rendering it a "nullity."¹¹⁶ If the agency could change the effective date at will, it essentially could repeal a rule without a rulemaking proceeding.¹¹⁷ The court found that this

would create a contradiction in the [APA] where there need be no contradiction: the [APA] would provide that the repeal of a rule requires a rulemaking proceeding, but the agency could (albeit indirectly) repeal a rule simply by eliminating (or indefinitely postponing) its effective date, thereby accomplishing without rulemaking something for which the [APA] requires a rulemaking proceeding.¹¹⁸

Treating the delay of a rule's effective date as a substantive amendment subjects it to the APA's procedural requirements, thus resolving the contradiction.¹¹⁹

Furthermore, as a substantive amendment, delaying the effective date of a rule is "final action" and thus reviewable under the APA.¹²⁰ Indeed, most of the agencies acknowledged this by calling the delays "final rules."¹²¹ The fact that the midnight regulations had not taken effect diminishes neither their final nature nor the final nature of the delays. The APA requires that all final rules appear in the Federal

¹¹³ See *supra* notes 70-71 and accompanying text.

¹¹⁴ See *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 580 & n.28 (D.C. Cir. 1981). No court has ruled to the contrary.

¹¹⁵ *Natural Res. Def. Council*, 683 F.2d at 761 n.21, 762 (quoting 5 U.S.C. § 551(4) (1976) (defining "rule" as "an agency statement of . . . future effect")).

¹¹⁶ *Id.* at 762.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *id.* at 759-60.

¹²¹ See, e.g., National Medical Support Notice: Delay of Effective Date, 66 Fed. Reg. 8076, 8076 (Jan. 26, 2001) (calling agency action "Final rule"). But see Clarification of Parole Authority; Delay of Effective Date, 66 Fed. Reg. 7863, 7863 (Jan. 26, 2001) (calling agency action "Interim rule").

Register at least thirty days before their effective date.¹²² “To argue that an alteration is interlocutory because the rule remains ‘proposed’ until the thirty day period has run vitiates the purpose behind the thirty day requirement”¹²³

Finally, some of the delays may have significant real-world consequences despite their limited duration. For example, pursuant to the Card Memo, the Department of Energy delayed the effective date of a rule imposing stringent new energy efficiency standards on central air-conditioning units and heat pumps.¹²⁴ The Department then proposed modifying the rule to make it less stringent.¹²⁵ However, the Energy Policy and Conservation Act¹²⁶ contains an antibacksliding provision that prohibits weakening the standards once they have taken effect.¹²⁷ Thus, if the initial delay was invalid, the original rule would have taken effect, thwarting the new administration’s attempt to relax the standards.¹²⁸

In any event, as Reagan’s OLC acknowledged, the limited impact of a delay does not exempt it from the “reasoned decisionmaking” that courts require for agency action.¹²⁹ Indeed, while the limited scope of a rule might somewhat diminish the agency’s responsibility to explain it, the fact that the delays constitute a reversal of the agency’s position should subject them to closer judicial scrutiny.¹³⁰ Although agencies are free to change their position, courts consider a reversal a “danger signal[]” that the new course may not promote statutory policies.¹³¹ An agency reversal seems even more suspicious when it occurs just days after the promulgation of the original rule. Has the

¹²² 5 U.S.C. § 553(d) (2000).

¹²³ *Natural Res. Def. Council*, 683 F.2d at 759.

¹²⁴ Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 8745 (Feb. 2, 2001). For language concerning stringent new efficiency standards, see 10 C.F.R. pt. 430 (2002).

¹²⁵ See Energy Conservation Program for Consumer Products; Central Air Conditioners and Heat Pumps Energy Conservation Standards, 66 Fed. Reg. 20,191 (Apr. 20, 2001).

¹²⁶ 42 U.S.C. §§ 6291-6309 (2000).

¹²⁷ See § 6295(o)(1).

¹²⁸ Cf. *New York v. Abraham*, 199 F. Supp. 2d 145 (S.D.N.Y. 2002) (dismissing challenge to this delay on jurisdictional grounds).

¹²⁹ See Presidential Memorandum Delaying Proposed and Pending Regulations, 5 Op. Off. Legal Counsel 55, 57 (1981).

¹³⁰ See, e.g., *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983). In *State Farm*, the Court reasoned that the short time between the promulgation of an agency’s auto safety rule and its repeal raised suspicions requiring close judicial attention. See *id.* at 41. The Court went further, adding that “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.” *Id.* at 42.

¹³¹ See Merrick B. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 505, 553 (1985) (quoting *State Farm Mut. Auto. Ins. Co. v. Dep’t of Transp.*, 680 F.2d 206, 221

state of the world really changed since the rule's promulgation? Will the new course of action still reflect the policies of the statute or will it reflect the possibly incompatible policies of the new President?

III THE DELAYS WERE ILLEGAL

This Part argues that the delays of the midnight regulations were illegal and that courts should invalidate such delays if ever attempted again. Part III.A subjects the delays to the "hard look" review that courts use to evaluate agency action. It concludes that the delays could not survive such scrutiny. Part III.B asserts that invalidation is the right result—reiterating the boundary between rulemaking and legislation and thus helping to preserve the Constitution's system of dispersed power.

A. The Delays Were Arbitrary and Capricious

The APA requires agencies to include in every regulation "a concise general statement of their basis and purpose."¹³² It calls on courts to invalidate any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."¹³³ Through the interaction of these two requirements, courts have created the "hard look" review standard by which they test any challenged agency rule.¹³⁴ The standard has two elements germane to this Note: A rulemaking agency must engage in reasoned decisionmaking and, in reaching its decision, it must consider the factors that Congress deemed relevant.¹³⁵

Courts require that agencies base their decisions on an informed inquiry into their advantages and disadvantages. As the Supreme Court has explained, "The agency must explain the evidence which is

(D.C. Cir. 1982)) (arguing that deregulation raised special concerns about agencies' "fidelity" to their authorizing statutes).

¹³² 5 U.S.C. § 553(c) (2000).

¹³³ § 706(2)(A). The Supreme Court's classic summary of the arbitrary and capricious standard appears in *State Farm*:

Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

463 U.S. at 43.

¹³⁴ See Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.4 (4th ed. 2002).

¹³⁵ A third element, that agencies must respond to all major comments, does not apply here because agencies did not engage in notice-and-comment procedures when issuing the delays. See *supra* note 90 and accompanying text.

available, and must offer a 'rational connection between the facts found and the choice made.'"¹³⁶ This explanation must be articulated by the agency at the time it promulgates a rule; it cannot be a post hoc rationalization offered by the agency's appellate counsel.¹³⁷ When, as here, the rule reverses a previously held agency position, the scrutiny is even closer: "A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.'"¹³⁸

Not just any reasons will do. The agency must explain the action with reference to the factors and policies Congress expressed in the statute that created the agency's rulemaking authority.¹³⁹ This requirement goes to the heart of administrative rulemaking: Agencies' power derives from statutory delegations of authority. They must wield power only to advance the purposes that the statute expresses. "[N]o matter how 'important, conspicuous, and controversial' the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."¹⁴⁰

"Hard look" review is not a mere doctrinal nicety. Although not necessarily required by the Constitution,¹⁴¹ it is essential to the legitimacy of administrative rulemaking.¹⁴² "Hard look" review ensures that agencies are acting pursuant to their statutory mandate rather

¹³⁶ *State Farm*, 463 U.S. at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

¹³⁷ *Id.* at 50.

¹³⁸ *Id.* at 41-42 (quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)).

¹³⁹ Indeed, now-Judge Garland argues that the main purpose of "hard look" review is to ensure fidelity to congressional intent. Garland, *supra* note 131, at 553-57.

¹⁴⁰ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (citation omitted).

¹⁴¹ Cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. Rev. 461, 528-29 (2003) (arguing that "hard look" review is essential to prevent arbitrariness, which is important constitutional concern).

¹⁴² See Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 Chi.-Kent L. Rev. 987, 1022-27 (1997) (asserting that judicial review legitimizes agency action by grounding it in law); Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 Fordham L. Rev. 17 (2001) (contending that giving reasons for rules legitimizes agency action); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 Duke L.J. 387, 428-31 (maintaining that rationalism in agency action preserves liberal values and separation of powers).

than pursuing private interests.¹⁴³ The requirement that agencies explain how law and fact interact to support their actions serves as the principal check on agency power since they do not face the electoral checks that constrain the political branches.¹⁴⁴ Without “hard look” review, delegations of rulemaking power to the agencies would not be sustainable within our constitutional framework; agency rules would be literally “arbitrary and capricious”—that is, a product of will rather than law.¹⁴⁵

The midnight-regulation delays cannot survive “hard look” review. First, those that merely cite the President’s authority should fail automatically because they do not offer any reason for the delays. Here the question of presidential authority is irrelevant—the rules would fail even if the order came from the statutory delegee. Although agencies need not give elaborate justifications for every brief delay, they must provide some explanation.¹⁴⁶ Otherwise, the rulemaker could delay regulations with no accountability or review, effectively repealing them.

The rules that cite to the policies underlying the President’s order present a different question. They do give reasons. Indeed, the reasons given by some agencies in response to the first Reagan order were compelling, if controversial.¹⁴⁷ However, the cited policies were the President’s, not those that Congress expressed in the statute creating the agency’s rulemaking authority. In fact, the President’s policies may even have been hostile to the statute and constituted an attempt to effect its administrative repeal.¹⁴⁸

Thus, it is hard to see how a court could recognize these policies as a valid basis for rulemaking. Whatever the power of presidents to order action pursuant to an agency’s statutory mandate, they surely could not expand it unilaterally. If presidents could do this, they could impose standards of conduct on society—truly legislate—without following the complex and cumbersome procedures provided in Article I of the Constitution. As the next Section argues, such a result

¹⁴³ See Bressman, *supra* note 141, at 476-77 (arguing that D.C. Circuit developed “hard look” review to ensure broad participation in rulemaking process).

¹⁴⁴ Judges, who are not accountable to voters, also must justify their decisions with reasons that relate to the law they are enforcing. See Mashaw, *supra* note 142, at 20-21.

¹⁴⁵ See Bressman, *supra* note 141, at 474 (arguing that hard look review is chiefly concerned with preventing arbitrariness by administrative decisionmakers).

¹⁴⁶ See, e.g., *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573, 579 (D.C. Cir. 1981) (upholding delay of rule requiring certain masks for coal miners where delay order explained “[i]n a few brief paragraphs” that testing on masks was not finished).

¹⁴⁷ See *supra* notes 84-85, 88 and accompanying text.

¹⁴⁸ See Percival, *Checks Without Balance*, *supra* note 28, at 147-54 (concluding that exclusive focus of Reagan-era regulatory review was to provide regulatory “relief” to industry notwithstanding intent of environmental statutes).

would transform administrative rulemaking into a source of concentrated authority inconsistent with the Constitution's scheme of dispersed power.

B. Law, Politics, and the Balance of Power

Much more is at stake here than the question of whether the President may direct agency heads in the exercise of their delegated discretion. Acquiescence to rules like the midnight-regulation delays threatens to transform rulemaking from a reviewable, bounded exercise of delegated power into a discretionary, political act. Such a transformation can occur through a steady accumulation of unopposed political precedent that reshapes the "psychology of government;"¹⁴⁹ and one cannot count on courts to stop it if it gains further momentum.¹⁵⁰ The challenge and invalidation of the midnight-regulation delays would have reinforced the boundary between rulemaking and legislation and reestablished it as the limit of presidential authority.

As mentioned earlier, courts long have distinguished between executive actions that are required by statute and those that are discretionary, political, and unreviewable.¹⁵¹ Agency rulemaking is a hybrid of the two.¹⁵² The agency has discretion to make policy, but only within the limits of the statutory delegation. Indeed, "hard look" review is largely an exercise of determining whether the agency's policy choice is permissible given the statute. If the choice is merely one of several that the statute would permit, a court "is not empowered to substitute its judgment for that of the agency."¹⁵³

Allowing agencies to cite the President's orders as reasons for enacting rules undermines this balance between law and politics.¹⁵⁴ It threatens to turn rulemaking into a manifestation of presidential will—a purely political act. Such political acts have no standards to restrain them other than the limits the Constitution imposes on the

¹⁴⁹ See *infra* notes 161-62 and accompanying text.

¹⁵⁰ See *infra* notes 165-69 and accompanying text.

¹⁵¹ See *supra* note 18 and accompanying text.

¹⁵² See Strauss, *supra* note 38, at 968-80.

¹⁵³ *Citizens to Pres. Overton Park v. Volpe, Inc.*, 401 U.S. 402, 416 (1971). Room for agency—and by extension presidential—policymaking can be quite broad. First, Congress has passed—and the Court has sustained—extremely broad delegations of rulemaking authority, leaving many policy options that can be justified with reference to statutory purposes. See, e.g., *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457 (2001) (upholding Clean Air Act delegation to EPA to set air quality standards at levels "requisite to protect the public health"). Second, if a statute is ambiguous, the agency can choose an interpretation consistent with its policy as long as it is not unreasonable. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹⁵⁴ See Strauss, *supra* note 38.

government as a whole.¹⁵⁵ It turns the President into a proactive legislative force in any subject area in which Congress has delegated rulemaking authority. Freed from the obligation to adhere to the policies expressed in the delegating statute, the President no longer can honestly claim to be “executing the law.”¹⁵⁶ Such a concentration of arbitrary power is antithetical to our constitutional scheme.¹⁵⁷

This argument may seem hyperbolic.¹⁵⁸ It is true that the midnight-regulation delays were limited in scope and duration, and that so far no agency has tried to cite presidential authority for a major substantive rule. However, because courts rarely have the opportunity to rule on the subject, political precedent plays a central role in determining the distribution of power within the federal government.¹⁵⁹ As we have seen, years of presidential directives have bred a habit of obedience in the agencies and casual acquiescence on the part of the pub-

¹⁵⁵ Among these forces is the restraining power of electoral accountability. Indeed, many argue that popular election and accountability confer democratic legitimacy on the presidential exercise of rulemaking authority—or at least make the President a more legitimate rulemaker than unelected agency officials. See, e.g., Kagan, *supra* note 8, at 2331-38. But see Farina, *supra* note 142 (maintaining that elections are insufficient to legitimate presidential rulemaking). On a more originalist note, see also *The Federalist* No. 48 (James Madison) (arguing that separate, multimember legislature is required to mitigate dangers of executive power).

¹⁵⁶ See U.S. Const. art. II, § 3 (President “shall take Care that the Laws be faithfully executed”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”). But cf. Presidential Memorandum Delaying Proposed and Pending Regulations, 5 Op. Off. Legal Counsel 55 (1981) (deriving authority for Reagan order from Take Care Clause, U.S. Const. art. II, § 3).

¹⁵⁷ See Bressman, *supra* note 141, at 494-503 (asserting that preventing arbitrary exercise of power is chief aim of United States Constitution).

¹⁵⁸ Indeed, due to its consciously formalistic nature, this Note might appear nitpicky to the modern functionalist reader. But acquiescence to formal anomalies creates political precedent that can alter the distribution of governmental power. See *infra* notes 159-63 and accompanying text.

¹⁵⁹ In *Youngstown*, the seminal case on the distribution of power within the federal government, several opinions emphasized the role of political precedent in determining that distribution. For example, in his influential concurrence, Justice Jackson described how the President may accumulate power at Congress’s expense within the “zone of twilight” between the President’s Article II powers and explicit statutory mandates: “[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.” 343 U.S. at 637 (Jackson, J., concurring). Justice Frankfurter agreed:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.

Id. at 610-11 (Frankfurter, J., concurring); see also Bruce Ackerman & David Golove, Is NAFTA Constitutional?, 108 Harv. L. Rev. 799 (1995) (maintaining that Constitution can be amended by political practice).

lic.¹⁶⁰ Acquiescence to any rulemaking based solely on presidential will threatens to alter the “psychology of government”¹⁶¹ and diminish the extent to which “civil servants and political appointees imagine themselves acting within a culture of law.”¹⁶² Ignoring the formalities of administrative law in “minor” instances can erode the distinction between rulemaking and legislation in the minds of regulators, politicians, and judges alike. As Justice Frankfurter wrote, “The accretion of dangerous power . . . [comes] from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”¹⁶³

Once this line is crossed, the other branches of government are unlikely to stop it. As noted earlier, Congress’s institutional limitations prevent it from defending its institutional interests.¹⁶⁴ In any event, its likely weapons—narrower delegations and restrictions on removal—may be impractical given the need for flexibility and accountability in modern government. Even if Congress could act, it could not count on the courts to cooperate in its struggle with the President. Despite occasional admonishments,¹⁶⁵ the courts largely have supported and encouraged the accumulation of presidential power¹⁶⁶ while simultaneously impairing Congress’s ability to exert its own control over administrative agencies.¹⁶⁷ Using creative statutory interpretation, a court can easily shift executive action from the reviewable realm of statutory mandate to the “zone of twilight,”¹⁶⁸ where the accumulating political precedent of presidential legislation

¹⁶⁰ See *supra* Part I.A.

¹⁶¹ Strauss, *supra* note 38, at 986.

¹⁶² *Id.*

¹⁶³ *Youngstown*, 343 U.S. at 594 (Frankfurter, J., concurring).

¹⁶⁴ See *supra* notes 61-66 and accompanying text.

¹⁶⁵ See, e.g., *supra* note 130 and accompanying text.

¹⁶⁶ Courts have approved, in dicta, the notion that presidential involvement in rulemaking enhances accountability and draws authority from the President’s “Take Care” duties. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (stating that agencies are better equipped than courts to fill statutory gaps because, *inter alia*, they are accountable to citizens through President); *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981) (“The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking.”). Indeed, the Supreme Court may have a systematic incentive to rule in favor of the President in disputes with Congress. See *Moe & Howell*, *supra* note 60, at 150-53 (arguing that courts systematically favor President because they depend on executive to enforce their rulings).

¹⁶⁷ See *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding unconstitutional congressional control over official exercising “executive power”); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto).

¹⁶⁸ See *supra* note 159.

can be transformed into an explicit stamp of constitutional approval.¹⁶⁹

CONCLUSION

Midnight-regulation delays provide a rare opportunity for subjecting claims of presidential directive power to judicial review. They allow courts to contain the expansion of presidential rulemaking by refusing to permit rulemaking based solely on the President's will. Such a ruling would have both practical implications and less tangible political consequences.

On a practical level, this analysis is important because such a presidential transition, with its attendant midnight regulations, is bound to happen again. A recognition that wholesale delay is illegal may deter the next President from issuing such an order, give agencies pause before obeying it, or simply provide ammunition to petitioners who challenge the delays in court. On a somewhat broader level, this analysis implies that the President may be powerless to influence rulemaking when the informal coercive mechanism described in Part I fails.¹⁷⁰ For example, if the head of a department—the explicit statutory delegatee—promulgates a regulation against the President's will, the President probably could not prevent such a regulation from taking effect, even if the President fires the insubordinate official.

In both the transition and insubordination scenarios, a new department head might find it difficult to reverse the rule. First, the reversal would be subject to the same cumbersome notice-and-comment proceeding as the original rule.¹⁷¹ While the new rulemaking proceeding lumbered on, the regulated parties would go through the expense of complying with the original rule, making a reversal even more expensive and inconvenient. Second, reversal might be prevented by statute, if, for instance, it included antibacksliding provisions.¹⁷² Third, under the “danger signal” doctrine, the reviewing court would scrutinize the reversal closely.¹⁷³ The agency would have

¹⁶⁹ The question of whether Congress spoke directly to a particular issue is often a close one. For example, in his *Youngstown* concurrence, Justice Jackson interpreted a series of congressional acts authorizing presidential seizure of property in some circumstances as an implicit prohibition of seizure during a labor dispute. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 639 (1952) (Jackson, J., concurring). However, one also plausibly could read the statutes to say nothing about such a seizure.

¹⁷⁰ See *supra* notes 61-64 and accompanying text.

¹⁷¹ 5 U.S.C. § 553 (2000) (requiring notice-and-comment procedures); see also *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 761-62 (3d Cir. 1982); *Council of S. Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981).

¹⁷² See *supra* notes 124-28 and accompanying text.

¹⁷³ See *supra* notes 130-31 and accompanying text.

to explain how the state of the world had changed in such a short period of time.

More importantly, however, this consciously formalistic analysis sends important signals to the actors on the rulemaking scene. It reiterates the importance of the formal distinctions between rulemaking as legally bounded policymaking and legislation as naked political action. Thus, the analysis highlights the boundary that the expansion of presidential rulemaking tentatively threatens to cross. By marking the outer limit of presidential rulemaking authority, it creates some friction against its previously irresistible expansion, containing its power to undermine the Constitution's checks and balances.