

PRESIDENTIAL AUTHORITY OVER EPA RULEMAKING UNDER THE CLEAN AIR ACT

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Recent efforts to revise the national ambient air quality standards for ozone have revived the longstanding tension between the EPA Administrator and the President with respect to rulemaking under the Clean Air Act.1 This Article explores the differing views regarding the autonomy of the EPA from the perspectives of the legislative, executive, and judicial branches of government. The Article concludes with an analysis of how presidential interference with EPA rulemaking may make agency decisions more vulnerable to judicial review.

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I. INTRODUCTION

During the past forty years of federal administrative law, there has been an increase in presidential authority due to the expansion of the regulatory

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1 42 U.S.C. §§ 7401–7671q (2006).

state. In the case of the Environmental Protection Agency (EPA), this has played itself out in an evolving tension between the EPA Administrator and the President, over the promulgation of the national ambient air quality standards (NAAQS).

Two recent conflicts illustrate this tension. In 2008, Administrator Stephen Johnson was criticized for changing EPA policy under pressure from the Bush White House, with respect to three items on the agency's regulatory agenda. Those items included the agency's review and revision of the ozone NAAQS, its review of California's petition for a waiver from federal preemption for its greenhouse gas regulations for new motor vehicles, and its abandonment of a proposed rule that would regulate tailpipe emissions following the decision of the United States Supreme Court in *Massachusetts v. Environmental Protection Agency*.² A similar conflict arose in September 2011, when President Obama requested that Administrator Lisa Jackson withdraw a final rule revising the ozone NAAQS, when she was about to promulgate the final rule.³ In both cases, allegations were made that the President had unlawfully interfered with the EPA Administrator's statutory obligations under the Clean Air Act.⁴

² 549 U.S. 497 (2007). See *EPA's New Ozone Standards: Hearing Before the Comm. on Oversight and Gov't. Reform, House of Representatives*, 110th Cong. 73 (2008) (opening statement of Rep. Henry A. Waxman) [hereinafter *New Ozone Standards Hearing*]. See also John Walke, *The President Sabotages Clean Air Protections, Part 1*, NRDC SWITCHBOARD, Sept. 5, 2011, http://switchboard.nrdc.org/blogs/jwalke/the_president_sabotages_clean.html (last visited Feb. 22, 2014) (calling Administrator Johnson's justifications for setting the NAAQS ozone level below that recommended by science advisors a "joke"). See Bryan Walsh, *California's Clean-Air Slapdown*, TIME, Dec. 20, 2007, <http://content.time.com/time/nation/article/0,8599,1697442,00.html> (last visited Feb. 22, 2014) (characterizing EPA's denial of California's requested waiver from federal preemption to regulate carbon dioxide emissions, announced by Administrator Johnson, as "torpedo[ing]" state efforts to regulate motor vehicle emissions). John Shiffman & John Sullivan, *An Eroding Mission at EPA*, PHILADELPHIA INQUIRER, Dec. 7, 2008, http://articles.philly.com/2008-12-07/news/24992895_1_climate-change-climate-change-deputy-administrator-jason-burnett (last visited Feb. 22, 2014) (calling Administrator Johnson's redraft of his climate change memorandum a "pale imitation of the original [memorandum]"). See generally Robert B. Moreno & Peter Zalzal, *Greenhouse Gas Dissonance: The History of EPA's Regulations and the Incongruity of Recent Legal Challenges*, 30 UCLA J. ENVTL. L. & POL'Y 121, 133-35 (2012) (discussing EPA's response to the *Massachusetts v. EPA* holding that provided newly "confirmed authority" to the EPA to regulate GHG emissions, and EPA's unwillingness to regulate them under the Clean Air Act during the Bush Administration).

³ See Press Release, White House, Statement by the President on the Ozone Ambient Air Quality Standards (Sept. 2, 2011), <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards> (White House Office of the Press Secretary's statement regarding President Obama's request to EPA Administrator Lisa Jackson to withdraw the EPA's NAAQS revision). See also John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES, Sep. 2, 2011, <http://www.nytimes.com/2011/09/03/science/earth/03air.html> (last visited Feb. 22, 2014) (discussing President Obama's rejection of ozone NAAQS proposed by Lisa Jackson).

⁴ See John M. Broder, *Groups Sue After E.P.A. Refuses to Shift Ozone Rules*, N.Y. TIMES, Oct. 11, 2011, <http://www.nytimes.com/2011/10/12/science/earth/12epa.html> (last visited Feb. 22, 2014) (discussing allegations that President Obama's refusal to adopt Lisa Jackson's recommended NAAQS was unlawful).

Part I of this article reviews the structure of the Clean Air Act, with a focus on the different roles of the President and the EPA Administrator.⁵ Part II considers the importance of ozone as a criteria pollutant subject to regulation under the Clean Air Act, and how it has become a driving force in the tension between Congress and the President over the promulgation of the NAAQS. It reviews the facts surrounding the decisions of Administrator Stephen Johnson and Administrator Lisa Jackson regarding the revision of the ozone NAAQS, in the face of pressure from the White House. Part III reviews how Congress, the President, and the Supreme Court have differing views regarding the relationship between the President and federal agencies. Part IV evaluates the special case of the EPA in the universe of federal agencies, arising out its unique creation in 1970 and its powerful role as protector of the environment. Part V concludes that contemporary presidential predominance over the EPA merely reflects a historical pattern of acquiescence by a Congress that has not vigorously resisted presidential influence. Because of this predominance, challenges to EPA action based on alleged interference by the President are unlikely to be successful, either legally or politically. However, presidential interference generally causes EPA rulemakings to become less about science and more about politics, making such decisions more vulnerable to challenge under applicable standards of review.

A. *The Clean Air Act, the Administrator, and the President*

While the Clean Air Act is considered the nation's first command-and-control environmental statute, it was not the first modern federal environmental statute.⁶ That credit goes to the National Environmental Policy Act of 1969 (NEPA), effective the first day of the year 1970.⁷ But the Clean Air Act was the first substantive environmental statute. Effective the

⁵ For other views on the directive authority of the President, see Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 *FORDHAM LAW REVIEW* 2487, 2538 (2011) ("Although it is unlikely that the debate over whether the President has the legal authority to dictate the substance of regulatory decisions entrusted by statute to agency heads ever will be definitively resolved, the view most widely accepted by scholars is that the President does not."); Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate Over Law or Politics?*, 12 *U. PA. J. CONST. L.* 637, 649 (2010) ("If the constitutional debate over presidential power is defined as one between permissible influence and impermissible control of administrative agencies, the nation appears to have nothing but politics to police this debate.").

⁶ See Theodore L. Garrett & Sonya D. Winner, *A Clean Air Act Primer* in *CLEAN AIR DESKBOOK THE ENVIRONMENTAL LAW REPORTER* 3, 7 (1992).

⁷ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321-4370h). See also Kyle Carlson, *SEED: Sustainable and Economic Development—A Call to Incorporate Verifiable Sustainability Ratings into NEPA Reviews*, 43 *ENVTL. L.* 145, 150-51, 158-60 (2013). NEPA was significant in imposing a procedural requirement that a federal agency prepare an environmental impact statement for an agency action having an impact on the environment. Over time, this procedural requirement was interpreted by the courts to develop a substantive body of law regarding environmental impacts.

last day of the year 1970, it created a comprehensive regulatory scheme for protecting public health and welfare from air emissions from industrial facilities (stationary sources) and cars and trucks (mobile sources).⁸ Both types of sources cause air emissions of volatile organic compounds (VOCs) and nitrogen oxides (NO_x), which react with each other in the presence of the sun's ultraviolet light to form ozone, a lung-searing chemical that is dangerous to human health and the environment.⁹

"Cooperative federalism" forms the engine of the Clean Air Act, and is embodied in sections 108, 109, and 110 of the statute.¹⁰ Section 108 requires the Administrator to publish a list of air pollutants that may endanger public health or welfare.¹¹ Exercising this authority, EPA Administrators have identified six "criteria pollutants," including ozone.¹² Section 109 requires the Administrator to promulgate National Ambient Air Quality Standards (NAAQS) for these "criteria pollutants," and "review and revise standards, as may be appropriate."¹³ These standards are national, uniform levels of pollution that are binding and enforceable against all states, rather than directly against facilities.¹⁴

The Clean Air Act makes air pollution prevention and control the primary responsibility of state and local governments.¹⁵ Once the Administrator has identified criteria pollutants and promulgated NAAQSs, section 110 requires states to prepare and submit state implementation plans (SIPs) to EPA for its review and approval.¹⁶ In reviewing their SIPs, EPA cannot dictate to the states the specific policy choices for achieving the NAAQSs. Rather, such decisions are left to the discretion of the states.¹⁷

⁸ See Clean Air Act, 42 U.S.C. § 7401 (2006). See generally Garrett & Winner, *supra* note 6, at 7–13 (providing the history and structure of the Clean Air Act and an overview of NAAQS).

⁹ EPA, *Ground Level Ozone; Basic Information*, <http://www.epa.gov/glo/basic.html> (last visited Feb. 15, 2014); *California Needs Tougher Rules on Ozone*, SFGATE, Aug. 29, 2007, <http://www.sfgate.com/opinion/article/California-needs-tougherrules-on-ozone-2543861.php> (last visited Feb. 22, 2014).

¹⁰ Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENVTL. L.J. 179, 180 (2006) (providing a definition of "cooperative federalism").

¹¹ 42 U.S.C. § 7408(a)(1) (2006).

¹² EPA, *National Ambient Air Quality Standards*, <http://www.epa.gov/air/criteria.html> (last visited Feb. 15, 2014). See generally 40 C.F.R. pt. 50 (2012) (detailing the criteria pollutants and their air quality standards). "Criteria pollutants" is not a statutory term, but a regulatory term that is used to refer to pollutants identified by the EPA Administrator under section 108 of the Clean Air Act. See, e.g., 40 C.F.R. § 52.31 (2013).

¹³ 42 U.S.C. § 7409(d) (2006).

¹⁴ *Id.* § 7410(a)(1).

¹⁵ *Id.* §§ 7401(a)(3), 7407(a). Under section 116, states and their political subdivisions may generally adopt and enforce more stringent standards than federal standards. *Id.* § 7416. However, states are preempted from regulating mobile sources. *Id.* § 7543(a). Under section 209, there is an exception for California if a waiver has been granted by EPA, and for other states adopting California regulations under a California waiver. *Id.* § 7543(e)(2).

¹⁶ *Id.* § 7410(a).

¹⁷ *Train v. Nat. Res. Defense Council, Inc.*, 421 U.S. 60, 79 (1975) ("The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2).").

Consequently, EPA's role in the regulation of criteria pollutants largely involves determining appropriate ambient air quality standards. Congress has directed the Administrator to promulgate primary standards that are "requisite to protect the public health," while "allowing an adequate margin of safety."¹⁸ In addition, the Administrator is required to promulgate secondary standards that are "requisite to protect the public welfare," which contemplates effects on the environment.¹⁹ The setting of the NAAQS has been driven principally by concerns for public health, as opposed to public welfare. As in the case of ozone, EPA often promulgates a primary standard for public health, and then sets a secondary standard for public welfare at the same level.²⁰

The statute requires the Administrator to appoint an independent scientific review committee (the Clean Air Scientific Advisory Committee, or CASAC) to complete a review of criteria that might inform the Administrator's judgment in setting the NAAQSs.²¹ The Administrator must review any promulgated NAAQS every five years, and revise it, if appropriate.²²

Nowhere in sections 108, 109, or 110 has Congress identified a role for the President.²³ Congress specifically mentions the President in other contexts throughout the Clean Air Act. But those references typically relate to duties and powers of a presidential nature, such as the determination of national security waivers of statutory requirements.²⁴ The Clean Air Act spends much more time delineating the authorities and duties of the Administrator, rather than the President. While the Administrator is mentioned 2,474 times in the Clean Air Act, the President is mentioned only seventy times.²⁵ This uneven division of attention is also characteristic of the other two principal command-and-control statutes, the Clean Water Act and the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act.²⁶

Federal laws relating to air pollution before 1970 either did not refer to the President at all, or when referring to the President, did not contemplate a

¹⁸ 42 U.S.C. § 7409(b)(1) (2006).

¹⁹ *Id.* § 7409(b)(2).

²⁰ *See National Ambient Air Quality Standards, supra* note 12 (showing the similarity between primary and secondary standards). *See* 40 C.F.R. § 50.9 (2013) (one-hour primary and secondary standard set at 0.12 parts per million, in 1997). 40 C.F.R. § 50.10 (2013) (eight-hour primary and secondary standard set at 0.08 parts per million, in 1997); 40 C.F.R. § 50.15 (2013) (eight-hour primary and secondary standard set at 0.075 parts per million, in 2008).

²¹ 42 U.S.C. § 7409(d)(2) (2006).

²² *Id.* § 7409(d)(1).

²³ *Id.* §§ 7408, 7409, 7410.

²⁴ *See id.* § 7412(i)(4) (granting authority to the President to exempt a stationary source from any standard or limitation under section 112 (relating to hazardous air pollutants), based on national security interests).

²⁵ *See id.* §§ 7401–7671q (2006).

²⁶ While Congress refers to the Administrator 1,178 times in the Clean Water Act, it refers to the President only 81 times. Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2006). While Congress refers to the Administrator 826 times in the Solid Waste Disposal Act, it refers to the President only 19 times. 42 U.S.C. § 6901–6992 (2006).

degree of authority similar to EPA's post-1970 authority to set the NAAQS. These amendments were enacted in 1955,²⁷ 1963,²⁸ 1965,²⁹ 1967,³⁰ and 1970.³¹

In contrast, Congress chose a contrary approach in enacting the nation's remediation statute, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).³² In that statute, there are far more references to the President (441 references) than to the Administrator (269 references).³³ Therefore, when Congress intended for the President to have a greater role over the environment, it specifically chose to grant him that role.

The difference in relative treatment can be explained by the different purposes of the statutes. The Clean Air Act, the Clean Water Act, and the Solid Waste Disposal Act were primarily intended to regulate pollution of three types of environmental media (air, water, and land) occurring in the future.³⁴ In contrast, CERCLA was intended as a cleanup statute to remediate

²⁷ Air Pollution Control Act, Pub. L. No. 84-159, 69 Stat. 322 (1955).

²⁸ Clean Air Act, Pub. L. No. 88-206, 77 Stat. 392 (1963). Technically, the Clean Air Act was enacted in 1963, rather than in 1970. The amendments in 1970 represented the most dramatic in a series of amendments over the course of a number of years.

²⁹ Clean Air Act Amendment and Motor Vehicle Air Pollution Control Act, Pub. L. No. 89-272, 79 Stat. 992 (1965).

³⁰ Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485 (creating the President's Air Quality Advisory Board, responsible for making recommendations to the President (section 110), requiring the Secretary of Health, Education, and Welfare to make reports to the President and Congress regarding the need for training programs (section 305), and requiring the Secretary to report to Congress regarding the reports and recommendations of the President's Air Quality Advisory Board (section 306)).

³¹ Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (current version codified at 42 U.S.C. §§ 7401-7671q (2006)). While the 1970 amendments contained more references to the President, those references did not contemplate a degree of authority similar to the Administrator's authority in the setting of the NAAQS. Pub. L. No. 91-604 §4(a), 84 Stat. 1685-1686 (codified at 42 U.S.C. § 7412(i)(4) (2006)) (authorizing the President to exempt stationary sources from hazardous air pollutant requirements for reasons of national security, but requiring a presidential report to Congress; Pub. L. No. 91-604 § 5, 84 Stat. 1689-1690 (codified at 42 U.S.C. § 7418 (2006)) (authorizing the President to exempt federal stationary sources from requirements respecting control and abatement of air pollution based on a "paramount interest of the United States," but requiring a presidential report on exemptions to Congress; Pub. L. No. 91-604 § 10(c), 84 Stat. 1701 (codified at 42 U.S.C. § 7546 (2006)) (authorizing the President to designate one member of a Low-Emission Vehicle Certification Board as a Chairman; Pub. L. No. 91-604 § 12(a), 84 Stat. 1707 (codified at 42 U.S.C. § 7606 (2006)) (requiring the President to issue an order to federal agencies regarding compliance with federal contract procurement requirements and allowing exemptions based on the "paramount interest of the United States," but requiring a presidential report to Congress regarding exemptions; Pub. L. No. 91-604 § 14, 84 Stat. 1710 (codified at 42 U.S.C. § 7641 (2006)) (requiring the EPA Administrator to report to the President and Congress regarding the results of its investigations and study of noise pollution).

³² Pub. L. No. 96-510, 94 Stat. 2767 (current version codified at 42 U.S.C. §§ 9601-9675 (2006)).

³³ Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2006).

³⁴ 33 U.S.C. § 1251(a) (2006) (describing forward-looking Congressional goals of the Clean Water Act, including eliminating "the discharge of pollutants into the [Nation's] navigable waters . . . by 1985"); 42 U.S.C. § 7401(b)-(c) (2006) (describing forward-looking Congressional goals of the Clean Air Act relating to pollution prevention); 42 U.S.C. § 6902(a)-(b) (2006)

pollution that has occurred in the past.³⁵ CERCLA presented a compelling case for presidential involvement because the purpose was to require the cleanup of contaminated sites that were often abandoned, with no visible responsible party.³⁶ It was not a forward-looking regulatory statute, but a backward-looking remediation statute.

Three events occurring in 1970 created the conditions for modern power disputes over the ozone NAAQS—the organization of the Office of Management and Budget, the formation of the EPA, and the enactment of the Clean Air Act. In 1970, President Nixon created the Office of Management and Budget (OMB) by reorganizing the existing Bureau of the Budget, pursuant to a Reorganization Act.³⁷ The Bureau of the Budget had previously been a part of the Executive Office of the President, and the OMB continued to be a part of that same office.³⁸ But the organization of OMB in the same year that EPA was created set the stage for a long term struggle over environmental law and policy. The enactment of the Clean Air Act in the same year created the substantive law over which that struggle has been waged.

An early struggle between OMB and the EPA during the Nixon administration foreshadowed future conflicts.³⁹ On April 7, 1971, EPA published a proposed rule for the preparation of SIPs that would have required the states to establish and operate a permit system.⁴⁰ In its proposed rule, EPA did not include language allowing the states to consider economic impacts, costs, or benefits in preparing their SIPs.⁴¹ But in the final rule, EPA

(describing forward-looking congressional goals of the Solid Waste Disposal Act relating to the future generation, treatment, and storage of solid and hazardous waste).

³⁵ 42 U.S.C. § 9607(a)(1)–(4) (2006) (holding four types of potentially responsible parties liable for response, removal, and remedial costs: current owners and operators, past owners and operators of property where hazardous substances were disposed, persons who arrange for disposal of hazardous substances, and transporters of hazardous substances for disposal); *see also* CRAIG N. JOHNSTON, WILLIAM F. FUNK & VICTOR B. FLATT, *LEGAL PROTECTION OF THE ENVIRONMENT* 555 (3d ed. 2010).

³⁶ *See* DAVID M. BEARDEN, CONGRESSIONAL RESEARCH SERVICE, *COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT: A SUMMARY OF SUPERFUND CLEANUP AUTHORITIES AND RELATED PROVISIONS OF THE ACT 1* (2010), *available at* http://nepinstitute.org/get/CRS_Reports/CRS_Climate_and_Environment/Other_Environmental_Issues/Summary_of_Superfund_Cleanup_Authorities.pdf.

³⁷ Reorganization Plan No. 2 of 1970, 3 C.F.R. § 7959 (1970) (designating the Bureau of the Budget as the Office of Management and Budget); Exec. Order No. 11,541, 3 C.F.R. § 10737 (1970) (delegating duties to the Office of Management and Budget). Congress created the Bureau of the Budget in 1921. Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20.

³⁸ Exec. Order No. 11,541, *supra* note 37.

³⁹ JOHN QUARLES, *CLEANING UP AMERICA* 79 (1976) (acknowledging “charges that the Office of Management and Budget was directing EPA to make many compromises, overriding recommendations of the agency’s technical staff”).

⁴⁰ Preparation, Adoption, and Submittal of Implementation Plans, 36 Fed. Reg. 6,680, 6,682 (proposed Apr. 7, 1971) (to be codified at 42 C.F.R. pt. 420) (proposing section 4201.11(a)(4), “Legal Authority”); *id.* at 6,687 (presenting Appendix B, which contains “general provisions regarding permits for new construction”).

⁴¹ *See generally* 36 Fed. Reg. 6,680 (omitting the permit system that was contained in the proposed rule).

removed the provisions for a permit system.⁴² In addition, EPA included language that softened the substantive requirements for the states, by allowing for a consideration of economic impacts, costs, and benefits, in preparing their SIPs.⁴³

EPA's retrenchment on these points spurred speculation that it had given up key substantive requirements under pressure from OMB.⁴⁴ On February 16, 1972, the Senate Public Works Subcommittee on Air and Water Pollution commenced oversight hearings to investigate whether EPA was properly implementing the Clean Air Act.⁴⁵ A primary issue was the relaxation of new requirements for SIPs, as evidenced by changes from the proposed rule to the final rule.⁴⁶

Democratic Senator Thomas Eagleton led the charge.⁴⁷ Along with fellow Senator Muskie, he had been involved in the passage of the 1970 Clean Air Amendments.⁴⁸ He questioned Administrator Ruckelshaus regarding charges that EPA improperly identified OMB approval as the final step in the promulgation of the regulations.⁴⁹ Ruckelshaus responded that while OMB had the authority to review the cumulative effect of state implementation plans, OMB did not have the authority to approve the plans themselves.⁵⁰ Ruckelshaus stated that while he received comments from a number of sources regarding the proposed rules, the final decision on the rule was his own.⁵¹ But John Quarles, EPA's chief legal advisor at the time, perceptively noted that the final decision is not necessarily the most important one.⁵² Rather, the role of OMB is more nuanced, allowing it to exert substantial influence despite the nominal authority of EPA to make final decisions.⁵³

⁴² Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 36 Fed. Reg. 15,486, 15,486 (Aug. 14, 1971) (codified at 42 C.F.R. pt. 420) ("The requirement that States establish and operate a permit system has been eliminated; States still will be required to have authority to prevent construction, modification, or operation of sources.").

⁴³ *See id.* ("Provisions have been added to encourage States to consider the socio-economic impact and the relative costs and benefits of the various emission control strategies which can be employed to attain and maintain the national standards."); *id.* at 15,487 (reserving to states the authority to take into consideration the cost-effectiveness and the social and economic impact of control strategies); *id.* at 15,489 (encouraging the states to identify the costs and benefits of alternative control strategies); *id.* at 15,495 (setting forth emissions limitations that are attainable, but allowing the state agencies to consider the social and economic impact of them).

⁴⁴ QUARLES, *supra* note 39, at 82–83.

⁴⁵ *Id.* at 77.

⁴⁶ *Id.* at 83.

⁴⁷ *See id.* at 84–87 (discussing Senator Eagleton's efforts).

⁴⁸ *Id.* at 83.

⁴⁹ *Id.* at 86–87.

⁵⁰ *Id.*

⁵¹ *Id.* at 87.

⁵² *Id.* at 88.

⁵³ *Id.* ("Before a major regulation assumes its final form, dozens of preliminary decisions are made, which mold and change the end product. The establishment by OMB of procedures to review proposed EPA regulations, therefore, gave it an important influence over EPA's policies, even though Ruckelshaus retained control of the final decisions.").

B. A History of the Regulation of Ozone

Because of its adverse effects on human health and the environment, ozone has been a major focus of EPA's regulatory efforts to address air pollution.⁵⁴ Chemically, ozone is a molecule consisting of three atoms of oxygen (O₃).⁵⁵ Because of its tendency to readily oxidize, it is known as a lung-searing chemical, affecting both healthy humans and asthmatics.⁵⁶ In a similar chemical reaction, ozone also interferes with the growth of plants, resulting in adverse effects on the environment and the economy.⁵⁷ For these reasons, ozone is one of the six criteria pollutants subject to a NAAQS.⁵⁸

Ozone is unique among the six criteria pollutants because it is not a primary pollutant (i.e., one that is directly emitted from human activities such as the operation of an industrial facility or an automobile).⁵⁹ Rather, it is a secondary pollutant formed when nitrogen oxides combine with VOCs.⁶⁰ Nitrogen oxides are the product of combustion of fuel in industrial plants and automobiles.⁶¹ VOCs are the product of various human activities, industrial activities, and natural emissions from trees.⁶² In the presence of sunlight, these chemicals react together in the nearby air, or the troposphere.⁶³ High up in the stratosphere, ozone is beneficial to humans because it provides a shield from the ultraviolet rays of the sun.⁶⁴ But in the troposphere, ozone is harmful to humans and plant life.⁶⁵

Presidential power has influenced the history of ozone regulation, both directly and indirectly.⁶⁶ Ozone regulation predates the 1970 Clean Air Amendments. In 1970, the National Air Pollution Control Administration, a predecessor agency to the EPA, published criteria relating to photochemical oxidants, which are precursors to ozone formation.⁶⁷ Shortly after the

⁵⁴ EPA, OZONE: GOOD UP HIGH, BAD NEARBY (2003), available at <http://www.epa.gov/air/ozonepollution/pdfs/ozonegb.pdf>.

⁵⁵ EPA, *Ground-Level Ozone: Basic Information*, <http://www.epa.gov/air/ozonepollution/basic.html> (last visited Feb. 22, 2014) [hereinafter *Ground-Level Ozone*].

⁵⁶ See OZONE: GOOD UP HIGH, BAD NEARBY, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ See 40 C.F.R. §§ 50.9–10, 50.15 (2013).

⁵⁹ EPA, *Health Effects of Air Pollution: Ozone (O₃)*, <http://www.epa.gov/region07/air/quality/health.htm> (last visited Feb. 15, 2014).

⁶⁰ *Id.*

⁶¹ EPA, *Volatile Organic Compounds Emissions*, <http://cfpub.epa.gov/eroe/index.cfm?fuseaction=detail.viewPDF&ch=46&lShowInd=0&subtop=341&lv=list.listByChapter&r=219697> (last visited Feb. 15, 2014).

⁶² EPA, *An Introduction to Indoor Air Quality (IAQ): Volatile Organic Compounds (VOCs)*, <http://www.epa.gov/iaq/voc.html> (last visited Feb. 15, 2014); EPA, *Trees and Air Pollution*, http://www.epa.gov/ord/sciencenews/scinews_trees-and-air-pollution.htm (last visited Feb. 15, 2014).

⁶³ *Ground-Level Ozone*, <http://www.epa.gov/glo> (last visited Feb. 15, 2014).

⁶⁴ *Ground-Level Ozone*, *supra* note 55. Title VI of the Clean Air Act, titled "Stratospheric Ozone Protection," is dedicated to protecting the stratospheric ozone layer by eliminating or phasing out ozone-depleting substances. 42 U.S.C. §§ 7671–7671q (2006).

⁶⁵ *Ground-Level Ozone*, *supra* note 55.

⁶⁶ See Broder, *supra* note 4.

⁶⁷ Issuance of Air Quality Criteria and Information on Recommended Control Techniques, 35 Fed. Reg. 4,768, 4,768 (Mar. 19, 1970).

enactment of the 1970 amendments, the EPA set a NAAQS for photochemical oxidants at 160 micrograms per cubic meter (0.08 ppm).⁶⁸

In the late 1970s, EPA moved away from this approach.⁶⁹ In 1979, it changed the chemical designation of the pollutant from photochemical oxidants to ozone, and set both the primary and the secondary standard at 0.12 ppm.⁷⁰ This revision actually made the numerical standards higher than the standards promulgated in 1971, and this revision occurred during the Democratic administration of President Carter.

The 1977 amendments of the Clean Air Act required the completion of a review of the NAAQS by an independent scientific review committee every five years, starting no later than December 31, 1980.⁷¹ However, EPA did not propose any revisions to the ozone NAAQS for the next twelve years, during the Republican administrations of Presidents Reagan and Bush.⁷² Following the inauguration of President Clinton in 1993, the EPA still had not revised the ozone NAAQS.⁷³

But following President Clinton's reelection in November 1996, the EPA undertook a major action with respect to ozone. In December 1996, it proposed that the averaging time for the ozone NAAQS be changed from an hourly average to an eight-hour average, based on findings of health effects from exposure to ozone for up to eight hours.⁷⁴ On the same day, EPA also

⁶⁸ National Primary and Secondary Ambient Air Quality Standards, 36 Fed. Reg. 8,186, 8,186 (Apr. 30, 1971). The averaging time for the standard was a maximum one-hour concentration, not to be exceeded more than one time per year. This standard was actually less stringent than EPA's proposed standard of 125 micrograms per cubic meter, published several months previously. See Notice of Proposed Standards for Sulfur Oxides, Particulate Matter, Carbon Monoxide, Photochemical Oxidants, Hydrocarbons, and Nitrogen Oxides, 36 Fed. Reg. 1502, 1,503 (Jan. 30, 1971). At that time, EPA regulated photochemical oxidants similarly to hydrocarbons. See *id.* at 1,503 (setting the standard for both at 125 micrograms per cubic meter); 36 Fed. Reg. at 8,187 (setting the standard for both at 160 micrograms per cubic meter).

⁶⁹ See Review of the Photochemical Oxidant and Hydrocarbon Air Quality Standards, 42 Fed. Reg. 20,493 (Apr. 20, 1977) (Call for Information and Data) (requesting information relating to EPA's revision of integrated criteria for photochemical oxidants and hydrocarbons).

⁷⁰ Revisions to the National Ambient Air Quality Standards for Photochemical Oxidants, 44 Fed. Reg. 8,202, 8,202 (Feb. 8, 1979). The proposed standard for public health was actually higher (less stringent) than the proposed standard for welfare. Proposed Revisions to the National Ambient Air Quality Standard, 43 Fed. Reg. 26,962, 26,962 (June 22, 1978) (proposing a primary standard of 0.10 ppm and a secondary standard of 0.08 ppm).

⁷¹ Pub. L. No. 95-95, § 106, 91 Stat. 685, 691 (1977) (codified at 42 U.S.C. § 7409(d)(1) (2006)).

⁷² See ARNOLD W. REITZE JR., AIR POLLUTION CONTROL LAW: COMPLIANCE AND ENFORCEMENT 23-43 (2001) (describing EPA's failure to review the ozone standard between 1977 and 1994).

⁷³ National Ambient Air Quality Standards for Ozone; Proposed Decision, 57 Fed. Reg. 35,542, 35,543 (Aug. 10, 1992); Air Quality Criteria for Ozone and Related Photochemical Oxidants, 57 Fed. Reg. 38,832 (Aug. 27, 1992) (calling for scientific information for further updating of air quality criteria); National Ambient Air Quality Standards for Ozone—Final Decision, 58 Fed. Reg. 13,008 (Mar. 9, 1993) (announcing decision that revisions are not appropriate at this time).

⁷⁴ National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,719 (Dec. 13, 1996) (Proposed Rule). The Clean Air Scientific Advisory Committee unanimously recommended the revision. *Id.*

proposed revised standards for particulate matter.⁷⁵ EPA's decision to address particulate matter and ozone at the same time had great short-term and long-term significance. Because industrial plants, cars, and trucks all generate ozone precursors and particulate matter, these pollutants have become a major motivating factor in EPA's development of air pollution regulations and policy.⁷⁶

Based on the assumption that an ozone standard of 0.09 ppm over an eight-hour period would represent the same protection as the existing 0.12 ppm one-hour standard, EPA proposed a new standard of 0.08 ppm, which would be more stringent than the existing standard.⁷⁷ EPA's more stringent regulation of ozone was prompted by a strong President who sought an influential role in the promulgation of the ozone NAAQS.⁷⁸ In July 1997, EPA promulgated a final rule setting the primary and secondary standard for ozone at 0.08 ppm, daily maximum eight-hour average, to be met when the average of the annual fourth highest daily concentration is less than or equal to 0.08 ppm.⁷⁹

Following the 2000 presidential election, there was a change in political control of the White House. Because the final rule was promulgated in 1997, the five-year deadline for a review of the ozone NAAQS extended into the Bush presidency. In March 2003, environmental groups commenced

⁷⁵ National Ambient Air Quality Standards for Particulate Matter: Proposed Decision, 61 Fed. Reg. 65,638 (proposed Dec. 13, 1996) (to be codified at 40 C.F.R. pt. 50). EPA proposed dramatic revisions of the NAAQSs for particulate matter. *Id.* EPA proposed to subdivide particulate matter into PM₁₀ (coarse particulates, with a diameter less than ten micrometers), and PM_{2.5} (fine particulates, with a diameter less than 2.5 micrometers), and set standards for these newly defined criteria pollutants. *Id.* Particulate matter is considered a primary pollutant because it is emitted directly by stationary sources and mobile sources. EPA, *Particulate Matter (PM): Basic Information*, <http://www.epa.gov/pm/basic.html> (last visited Feb. 22, 2014). In addition, it is considered a secondary pollutant because it is also formed from the reaction of other criteria pollutants such as nitrogen oxides and sulfur dioxide in the air, to form nitrates and sulfates. *Id.*

⁷⁶ The increasingly detailed scientific evidence demonstrating the link between particulate matter and adverse effects on human health has driven EPA's regulation of particulate matter. In 1993, the Harvard Six Cities Study found an association between air pollution and mortality. Douglas W. Dockery et al., *An Association between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1,753, 1,756 (1993). On January 15, 2013, EPA lowered the NAAQS for PM_{2.5} from 15 micrograms per cubic meter to 12 micrograms per cubic meter, citing recent trends in the scientific and medical literature. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086, 3,088–89 (Jan. 15, 2013).

⁷⁷ National Ambient Air Quality Standards for Ozone: Proposed Decision, 61 Fed. Reg. 65,716, 65,748 (proposed Dec. 13, 1996) (codified at 40 C.F.R. pt. 50).

⁷⁸ See Implementation of Revised Air Quality Standards for Ozone and Particulate Matter, Memorandum for the Administrator of the Environmental Protection Agency, 62 Fed. Reg. 38,421, 38,421 (July 18, 1997) ("I have approved the issuance of new air quality standards to provide important new health protection for all Americans by further controlling pollution from ozone and particulate matter. These new standards promise to improve the lives of millions of Americans in coming years."). In a clear demonstration of his directive authority, the President stated, "I direct you to use the following elements when implementing the new air quality standards . . ." *Id.*

⁷⁹ National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,856 (July 18, 1997) (codified at 40 C.F.R. pt. 50).

litigation against EPA for failing to undertake a review of the NAAQS as required by the Clean Air Act.⁸⁰ Pursuant to a settlement agreement, EPA proposed a revision of the NAAQS in 2007, recommending a primary standard between 0.070 ppm and 0.075 ppm.⁸¹ In doing so, it rejected the recommendation of CASAC that the standard be set between 0.60 ppm and 0.070 ppm.⁸² In the final rule, the EPA Administrator set the primary standard at 0.075 ppm, rejecting the recommendations of CASAC.⁸³ In addition, the EPA Administrator set a secondary standard for the protection of public welfare at the same level as the primary standard, even though he had proposed a distinct secondary standard with a different level and a different form, based on cumulative impacts on welfare.⁸⁴ Public controversy ensued.⁸⁵

The controversy over the promulgation of the ozone NAAQS in 2008 is instructive regarding the tension between Congress and the President under the Clean Air Act. The apparent involvement of OMB and its Office of Information and Regulatory Affairs (OIRA) in the rulemaking, combined with a shifting position by EPA regarding the standards to be promulgated, in the face of EPA's imminent court deadline for review and revision of the standard, led to allegations of presidential interference with EPA decision making.⁸⁶ The result was a congressional investigation of EPA, and an interrogation of the EPA Administrator at a House Committee hearing.⁸⁷

Because EPA had not missed a deadline for the publication of a proposed rule or final rule, there was no clear violation of the Clean Air Act caused by the OMB review. As a result, the legitimacy of White House influence turned on the merits of the two decisions reached by the EPA Administrator. With respect to the first decision, the setting of the NAAQS at 0.075 ppm, there is nothing in the Clean Air Act that requires the EPA

⁸⁰ Complaint for Declaratory and Injunctive Relief, *Am. Lung Ass'n v. Whitman*, No. 1:03-cv-00778-ESH (D.D.C. Mar. 31, 2003). *See also* National Ambient Air Quality Standards for Ozone, 72 Fed. Reg. 37,818, 37,822 (proposed July 11, 2007) (codified at 40 C.F.R. pt. 50) (citing *Am. Lung Ass'n v. Whitman*, No. 1:03-CV-00778 (D.D.C. Mar. 31, 2003)).

⁸¹ 72 Fed. Reg. at 37,878. *See also* A Consent Decree at 1–2, *Am. Lung Ass'n v. Whitman*, C.A. No. 02-2239 (D.D.C. Mar. 14, 2003), available at http://www.epa.gov/ttn/oarpg/t1/reports/8od_cd31403.pdf.

⁸² 72 Fed. Reg. at 37,877.

⁸³ National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,482 (Mar. 27, 2008) (codified at 40 C.F.R. pts. 50, 58).

⁸⁴ In the proposed rule, the level of the national eight-hour primary ambient air quality standard for ozone was 0.070–0.075 parts per million, daily maximum eight-hour average. 72 Fed. Reg. at 37,916. The level of the national secondary ambient air quality standard for ozone was a cumulative index value of 7–21 ppm-hours. *Id.* This secondary standard was to be a seasonal standard that would be expressed as a weighted hourly concentration, cumulated over a twelve-hour daylight period between 8 am and 8 pm, during the consecutive three-month period of the ozone monitoring season. *Id.* But in the final rule, the primary standard was set at 0.075 parts per million, the secondary standard was set identical to the primary standard, and the proposed cumulative standard was eliminated. 73 Fed. Reg. 16,436, 16,511 (Mar. 27, 2008) (codified at 40 C.F.R. pts. 50, 58).

⁸⁵ Katherine Boyle, *White House Intervened in EPA's Ozone Decision—Democratic Memo*, GREENWIRE, May 20, 2008, <http://www.eenews.net/stories/64762> (last visited Feb. 22, 2014).

⁸⁶ *New Ozone Standards Hearing*, *supra* note 2.

⁸⁷ *Id.* at 1–3, 68.

Administrator to accept the recommendations of CASAC. In fact, the committee acts in an advisory capacity only, and merely has the authority to “recommend” action or “advise” the EPA Administrator.⁸⁸

The House Committee on Oversight and Government Reform conducted a hearing regarding alleged interference by the White House in EPA’s review and revision of the ozone NAAQS.⁸⁹ The EPA Administrator defended his decision to abandon the proposed cumulative index value for the secondary standard on three grounds: 1) historically, the primary and secondary standards were set at the same level and form, 2) the primary and secondary standards in the final rule were more stringent than the previous standards set in 1997, and 3) it was unlikely that a secondary standard based on a cumulative index value would be more protective of the environment than one that was identical to the primary standard.⁹⁰

On closer review, the first rationale—that the primary and secondary standards have been the same, historically—simply describes how the ozone standards have evolved. It does not provide a justification for revising or not revising an ozone standard after performing a five-year review.⁹¹ The second rationale—the final standards were more stringent than existing standards—does not provide a justification for abandoning the proposed cumulative ozone standard, in favor of another proposed standard. Rather, it merely established that a “revision” to existing standards was “appropriate,” based on the review of air quality criteria and existing standards.⁹²

The third rationale is an attempt to justify the Administrator’s choice of a revised standard to comply with the Supreme Court’s test for evaluating a NAAQS in *Whitman v. American Trucking Associations, Inc. (American Trucking)*.⁹³ In that landmark decision, the Court held that the primary standard must be “sufficient, but not more than necessary” to protect public health.⁹⁴ Although the Court did not say so directly, it would likely rule that the secondary standard must also be “sufficient, but not more than necessary” to protect public welfare, especially considering that the primary

⁸⁸ See Clean Air Act, 42 U.S.C. § 7409(d)(2)(B) (2006) (during the five-year review, the committee “shall recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate. . .”); *id.* § 7409(d)(2)(C) (requiring the committee to advise the Administrator regarding factors and considerations relating to the review of the national ambient air quality standards).

⁸⁹ See *New Ozone Standards Hearing*, *supra* note 2, at 1–3, 68.

⁹⁰ *Id.* at 71–73.

⁹¹ See 42 U.S.C. § 7409(d)(2) (2006).

⁹² See *id.*

⁹³ 531 U.S. 457 (2001).

⁹⁴ *Id.* at 473. The Administrator must set primary standards that are “based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.” 42 U.S.C. § 7409(b)(1) (2006). The Administrator must set a secondary standard that “based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects.” *Id.* § 7409(b)(2). The Supreme Court held that the term “requisite” in the context of the primary standard for ozone means “sufficient, but not more than necessary.” *Am. Trucking*, 531 U.S. at 473.

and secondary ozone standards were identical at the time of the case.⁹⁵ Because the Court did not elaborate on what is “sufficient” to protect public welfare, presumably this is a technical determination for which EPA is granted some degree of deference.⁹⁶

In abandoning the seasonal standard, the EPA Administrator took the position that it was unlikely for the seasonal form to provide more protection than the primary standard.⁹⁷ This was based on two different measurements of protectiveness. First, the Administrator stated that the implementation of the proposed seasonal standard would not have led to the creation of any additional nonattainment areas.⁹⁸ But this defined protectiveness in terms of whether a region will be in attainment or nonattainment, rather than in terms of the relative risk presented by the level and form of the standard. Second, with respect to the relative risks created by the two different standards, the uncertainties caused by the general lack of rural monitoring data created the possibility that the seasonal standard would either be insufficiently protective or overly protective of public welfare, either of which would violate the holding of *American Trucking*.⁹⁹ Essentially, EPA’s rationale was that there was too much scientific uncertainty to justify a seasonal standard.

Given the controversy surrounding this rule, EPA’s action was challenged in litigation by a number of groups in March 2008, including environmental petitioners, industry petitioners, and state petitioners.¹⁰⁰ But another presidential election in November 2008 led to a change in political control of the White House, and the new EPA Administrator Lisa Jackson sought a stay of the litigation pending further review of the standards, in March 2009.¹⁰¹

In January 2010, the EPA Administrator sought reconsideration of the ozone NAAQS.¹⁰² She published a proposed rule that would set a standard within a range of 0.060–0.070 ppm, the range that had been recommended by

⁹⁵ See *Am. Trucking*, 531 U.S. at 463. See also National Ambient Air Quality Standards for Ozone, 62 Fed. Reg. 38,856, 38,877, 38,894–95 (Jul. 18, 1997) (codified at 40 C.F.R. § 50.10). In addition, the Court stated that its holding that costs could not be considered in promulgating the primary standard also applied to the promulgation of the secondary standard. *Am. Trucking*, 531 U.S. at 471 n.3 (“For many of the same reasons described in the body of the opinion, as well as the text of § 109(b)(2) . . . we conclude that the EPA may not consider implementation costs in setting the secondary NAAQS.”). Therefore, the Court’s interpretation of the statutory term “requisite” should apply to both the primary and the secondary standards.

⁹⁶ See generally *Am. Trucking*, 531 U.S. 457.

⁹⁷ *New Ozone Standards Hearing*, *supra* note 2 (prepared testimony of Stephen Johnson) (stating that “[o]n the basis of an analysis looking at recent air quality data from currently monitored communities, the seasonal form of the standard would be unlikely to provide additional protection in any areas beyond that likely to be provided by the revised primary standard”).

⁹⁸ National Ambient Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,500 (proposed Mar. 27, 2008) (codified at 40 C.F.R. pts. 50, 58).

⁹⁹ See *id.*

¹⁰⁰ National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2,938, 2,944 (proposed Jan. 19, 2010).

¹⁰¹ *Id.*

¹⁰² *Id.*

CASAC prior to the 2008 final rule.¹⁰³ Following notice of the proposed rule and receipt of comments from the public, she prepared a draft final rule for review by OMB that would have reduced the primary standard to 0.070 ppm, the upper bound of CASAC's recommendation.¹⁰⁴

On September 2, 2011, Cass Sunstein, the Administrator of the Office of Information and Regulatory Affairs submitted a letter to the Administrator.¹⁰⁵ He stated that the President had instructed him to return the draft final rule to her for reconsideration, and that the President did not support finalizing the rule at that time.¹⁰⁶ The letter did not require Administrator Jackson to withdraw the ozone rule, but it was highly persuasive. The letter stated that “[t]he President has instructed me to return this rule to you for reconsideration.”¹⁰⁷

The legal authority for requesting the reconsideration was an executive order from the President stating that each “agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations.”¹⁰⁸ The letter noted the need to “minimize regulatory costs and burdens, particularly in this economically challenging time.”¹⁰⁹ Substantively, the letter set forth three reasons for returning the rule to EPA: 1) the revision was not mandatory, and the five-year cycle for review of the standards that began in 2008 would require revisiting the standards again in 2013, requiring a new assessment, 2) a final rule at that time would not be “based on the best available science,” required by Executive Order 13563, given that the 2008 rule was based on a review of scientific literature in 2006, and a new scientific assessment was already underway, and 3) that other regulatory initiatives and standards finalized by EPA would have the collateral effect of reducing ozone as well.¹¹⁰ These other initiatives included a joint rule from EPA and the Department of Transportation for greenhouse gas emissions from heavy-duty trucks,¹¹¹ EPA's Cross-State Air Pollution Rule (CSAPR) for interstate pollution,¹¹² and EPA's proposed section 112

¹⁰³ *Id.* at 2,991, 3,017–18.

¹⁰⁴ EPA, EPA-HQ-OAR-2005-0172, DRAFT FINAL RULE, OZONE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE 1, 34 (2011), *available at* http://www.epa.gov/glo/pdfs/201107_OMBdraft-OzoneNAAQSpreamble.pdf.

¹⁰⁵ Letter from Cass R. Sunstein, Adm'r of the Office of Info. and Regulatory Affairs, Office of Mgmt. and Budget, to Lisa Jackson, EPA Adm'r (Sept. 2, 2011), *available at* http://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* (quoting Exec. Order No. 12,866, incorporated into Exec. Order No. 13,563).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Less than two weeks later, EPA and NHTSA finalized a rule for heavy-duty vehicles. Greenhouse Gas Emissions Standards and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles, 76 Fed. Reg. 57,106 (Sept. 15, 2011).

¹¹² CSAPR involved an emissions trading program for nitrogen oxides and sulfur dioxide that was intended as an improvement on the Clean Air Interstate Rule (CAIR). *North Carolina v. EPA*, 531 F.3d 896, 930 (D.C. Cir. 2008) (invalidating CAIR), *modified on reh'g*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (remanding CAIR without vacatur until the substantive flaws were corrected by a new rule). CSAPR (also called the “Transport Rule”) was invalidated by the D.C. Circuit on the grounds that it did not comply with the “good neighbor” provision contained in

standards for mercury and other toxic pollutants (the MATS Rule, also known as the Utility MACT).¹¹³

Ultimately, EPA did not pursue this rule any further. Mindful of the President's direction that EPA should reduce uncertainty and minimize the regulatory burden on state and local governments, it issued a memorandum stating an intention to implement the 2008 NAAQS.¹¹⁴ To comply with the five-year review requirement, EPA contemplated a review by May 2013, a proposed rule by October 2013, and a final rule by July 2014.¹¹⁵ In June 2013, environmental organizations commenced a legal action challenging EPA's alleged failure to timely conduct a five-year review by March 2013.¹¹⁶

In July 2013, the United States Court of Appeals for the District of Columbia remanded to EPA the secondary ozone NAAQS promulgated in March 2008 because EPA had failed to establish that the level of protection (set equivalent to the primary standard) was "requisite to protect the public welfare."¹¹⁷ The Court did this because EPA had merely reasoned that the addition of a seasonal secondary standard would not increase the number of nonattainment areas,¹¹⁸ and because EPA failed to explain why it looked only at one potential seasonal standard.¹¹⁹ The Court did not vacate the rule, but left it in place in the meantime.¹²⁰

C. Different Views of What is an Independent Agency

The Constitution of the United States reflects a delicate balance among Congress, the President, and the Supreme Court. This balance is embodied

section 110(a)(2)(D) of the Clean Air Act, and violated the principle of cooperative federalism that underlies the regulation of criteria pollutants in sections 108, 109, and 110. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7, 12 (D.C. Cir. 2012), *reh'g en banc denied*, 2013 WL 656247, at *1 (D.C. Cir. Jan. 24, 2013), *cert. granted in part*, 133 S. Ct. 2857 (2013), and *cert. granted in part*, *Am. Lung Ass'n v. EME Homer City Generation, L.P.*, 133 S. Ct. 2857 (2013) (pending before the Supreme Court).

¹¹³ EPA finalized the MATS Rule in February 2012. National Emission Standards for Hazardous Air Pollutants From Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304 (Feb. 16, 2012). Business and industry groups have commenced litigation challenging the rule. *White Stallion Energy Ctr. v. EPA*, No. 12-1100, (D.D.C. Oct. 23, 2012), No. 12-1272 (D.D.C. July 27, 2012) (pending before the D.C. Circuit).

¹¹⁴ Memorandum from Gina McCarthy, Ass't Adm'r, Office of Air & Radiation, EPA, to Air Div. Dirs., Regions 1-10 (Sept. 22, 2011), *available at* <http://www.epa.gov/glo/pdfs/OzoneMemo9-22-11.pdf>.

¹¹⁵ *Id.*

¹¹⁶ Complaint ¶ 37, *Sierra Club v. EPA*, No. 13-2809 (N.D. Cal. June 19, 2013).

¹¹⁷ *Mississippi v. EPA*, 723 F.3d 246, 273 (D.C. Cir. 2013).

¹¹⁸ See *id.* at 271-72 (holding that EPA's conclusion that a seasonal standard "would be unlikely to provide additional protection" fails because it was "insufficient for EPA merely to compare the level of protection afforded by the primary standard to possible secondary standards").

¹¹⁹ *Id.* at 273.

¹²⁰ *Id.*

in the doctrine of separation of powers.¹²¹ Congress has the power to enact laws, the President has the power to execute the laws, and the Supreme Court has the power to interpret the laws.¹²² The history of the Clean Air Act exemplifies this separation of powers, with its extensive congressional amendments, numerous EPA rulemakings, and many Supreme Court decisions.¹²³

In practice, the lines of power are not always clear, especially in the case of an administrative agency like EPA. Its actions implicate all three kinds of governmental power—legislative, executive, and judicial. When EPA engages in a rulemaking under the Clean Air Act, it exercises a legislative power. When it commences an enforcement action against an industrial facility, it exercises an executive power. When it adjudicates a dispute in an enforcement proceeding, it exercises a judicial power. As a result, it is not surprising for EPA—or any other administrative agency—to find itself at the center of a separation of powers dispute, either politically or legally.

A review of those institutions' interpretations of relative authorities is critical to understanding the power dynamics among the Congress, the President, and the EPA Administrator, with respect to disputes over ozone rulemaking during the Bush and Obama Administrations.

1. The Legislative View

EPA was created by Reorganization Plan No. 3 of 1970.¹²⁴ Therefore, to determine how Congress has viewed the structural role of the EPA Administrator, it is necessary to review the evolution of Reorganization Acts that apply to executive reorganization plans. Congress passed the first Reorganization Act in 1939, as a means to reduce government expenditures in response to national deficits during the Great Depression.¹²⁵ That act applied to an “agency,” defined to include an “executive department”—historically, a cabinet-level organization such as the Department of Defense—and an “independent establishment” in the executive branch, although it did not define the term “independent establishment.”¹²⁶ Upon a finding by the President that the transfer, consolidation, or abolition of all or part of an “agency” was necessary, the President was required to prepare a

¹²¹ See U.S. CONST. art. I (referring to “legislative Powers”), art. II (referring to “executive Power”), and art. III (referring to “judicial Power”).

¹²² See *id.*

¹²³ See *infra* Part III.A–C (discussing legislative, executive, and judicial contributions to Clean Air Act jurisprudence).

¹²⁴ Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970) (codified as amended at 5 U.S.C. App.).

¹²⁵ Reorganization Act of 1939, Pub. L. No. 76-19, § 1(a), 53 Stat. 561 (1939) (codified at 5 U.S.C. § 133).

¹²⁶ *Id.* § 2 (“When used in this title, the term ‘agency’ means any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration, in the executive branch of the Government”).

reorganization plan and submit it to Congress.¹²⁷ The plan would take effect within sixty days, unless Congress passed a concurrent resolution opposing it.¹²⁸ The law prohibited a reorganization plan from providing for “the establishment of any new executive department.”¹²⁹

Following the passage of the act, President Roosevelt transmitted Reorganization Plan No. 1 to the Congress. He identified two legislative purposes in the Reorganization Act of 1939: the reduction in the number of agencies reporting directly to the President, and the assistance to the President in dealing with a modern administrative state.¹³⁰ Although these might appear to be contradictory purposes, the President did not see a contradiction. While he stated that “the only way in which the President can be relieved of the physically impossible task of dealing with 30 or 40 major agencies is by reorganization,” he made it clear that the agency heads would still report to the President, who is the “chief administrator of the Government.”¹³¹ A strong, activist president, he clearly believed that the work of the Executive Branch is carried out through executive departments and agencies, and that “the responsibility to the people is through the President.”¹³²

In 1966, Congress undertook a comprehensive codification of laws relating to the organization of the federal government.¹³³ It codified a revised procedure for submitting and approving reorganization plans.¹³⁴ By statute, it only authorized reorganization plans by the President until December 31, 1968.¹³⁵ In contrast to the more detailed definition of “agency” in the 1939 law, the new law included a simpler definition of “Executive agency” that included only “an Executive department, a Government corporation, and an “independent establishment.”¹³⁶ The law also added a definition of “independent establishment,” to mean an agency other than an Executive department, a government corporation, or military department.¹³⁷ Executive

¹²⁷ *Id.* § 4.

¹²⁸ *Id.* § 5(a).

¹²⁹ *Id.* § 3(a). Apparently, Congress did not intend for the Reorganization Act to be used to strengthen presidential power, at least to the extent this power was embodied in executive departments.

¹³⁰ Franklin D. Roosevelt, *Message to Congress on the Reorganization Act*, April 25, 1939, <http://www.presidency.ucsb.edu/ws/?pid=15748> (last visited Feb. 15, 2014) (“This Plan is concerned with the practical necessity of reducing the number of agencies which report directly to the President and also of giving the President assistance in dealing with the entire Executive Branch by modern means of administrative management.”).

¹³¹ *Id.*

¹³² *Id.*

¹³³ Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 378.

¹³⁴ *Id.* § 901–913, 80 Stat. at 393–98.

¹³⁵ *Id.* § 905(b), 80 Stat. at 396 (“A provision contained in a reorganization plan may take effect only if the plan is transmitted to Congress before December 31, 1968.”).

¹³⁶ *Id.* § 105, 80 Stat. at 379.

¹³⁷ *Id.* § 104, 80 Stat. at 379 (“For the purpose of this title, ‘independent establishment’ means—(1) an establishment in the executive branch which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment; and (2) the General Accounting Office.”). The law has been revised to reflect the change in the name of the General Accounting Office to the Government Accountability Office

departments included those departments which historically have been characterized as cabinet-level agencies.¹³⁸ The 1939 law prohibited a reorganization plan from providing for “the establishment of any new executive department.”¹³⁹ The 1966 law actually strengthened this prohibition by providing that such a plan “may not have the effect of” creating a new executive department.¹⁴⁰

In a special message to Congress on January 30, 1969, President Nixon requested an extension of the authority to submit reorganization plans, past the deadline of December 31, 1968.¹⁴¹ In response, Congress extended the deadline for another three years.¹⁴² The House Committee on Government Operations supported the passage of the bill extending the deadline, commenting favorably on the history of the Reorganization Act.¹⁴³ The committee noted that this act “reverse[s] the usual legislative process by allowing the President to submit plans for reorganization which go into effect unless disapproved by the Congress within 60 days.”¹⁴⁴ However, it recognized that “this once unique method of legislating” has been increasingly used by Congress because it is not feasible to enact far-reaching changes in organization through direct legislation.¹⁴⁵ In addition, the authority being extended was merely the authority “to allow the President to

(GAO). *See* 5 U.S.C. § 104(2) (2006). The GAO views itself as serving the interests of Congress, rather than the President. U.S. Gov’t Accountability Office, *About GAO*, <http://www.gao.gov/about/index.html> (last visited Feb. 22, 2014) (“Our Mission is to support the Congress in meeting its constitutional responsibilities and to help improve the performance and ensure the accountability of the federal government for the benefit of the American people. We provide Congress with timely information that is objective, fact-based, nonpartisan, nonideological, fair, and balanced.”).

¹³⁸ *See* Pub. L. No. 89-554, § 101, 80 Stat. 378, 378 (identifying that in 1966, the 10 Executive departments were the Departments of State; Treasury; Defense; Justice; Interior; Agriculture; Commerce; Labor; Health, Education, and Welfare; and the Post Office Department). Today, there are 15 Executive departments: the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, Education, Veterans Affairs, and Homeland Security. 5 U.S.C. § 101 (2006). EPA has never been considered an Executive department, or located within an Executive department. *See* Reorganization Plan No. 3 of 1970, 3 C.F.R. § 199 (1970) (establishing EPA as an independent establishment).

¹³⁹ Reorganization Act of 1939, Pub. L. No. 76-19, § 3(a), 53 Stat. 561, 561. Congress reserved to itself the power to create new cabinet-level agencies. *Id.* § 3(c).

¹⁴⁰ Pub. L. No. 89-554, § 905, 80 Stat. at 396.

¹⁴¹ President’s Message to the Congress Urging Extension of the President’s Authority To Transmit Reorganization Plans, 5 WEEKLY COMP. PRES. DOC. 190, 191 (Jan. 30, 1969). Commenting on the reorganization plan procedure, President Nixon recognized the concurrent authorities of Congress and the President. *See id.* (“[T]he President may initiate improvements, and the Congress retains the power of review.”). But like President Roosevelt, he asserted the authority to shape the administrative bureaucracy, stating that “[r]eorganization authority is the tool a President needs to shape his Administration to meet the new needs of the times”. *See id.*

¹⁴² Act of Mar. 27, 1969, Pub. L. No. 91-5, 83 Stat. 6 (extending deadline from December 31, 1968, to April 1, 1971).

¹⁴³ H.R. REP. NO. 91-80 (1969), *reprinted in* 1969 U.S.C.C.A.N. 967, 971.

¹⁴⁴ *Id.* at 968.

¹⁴⁵ *Id.*

submit reorganization plans.¹⁴⁶ In the report, there was no suggestion that Congress was somehow giving up its legislative powers or its ultimate authority over enactment of such plans, which would presumably conflict with the U.S. Constitution.

In rejecting a proposal to exempt certain regulatory agencies from the scope of reorganization plans, the Committee noted that Congress had included “independent regulatory agencies” within the purview of the Reorganization Act since 1949.¹⁴⁷ The Committee stated it was fully aware of this practice, and that Congress was able to exert its will in connection with such agencies.¹⁴⁸ However, it did not define what it meant by “independent regulatory agencies.”¹⁴⁹

In contrast, the minority views of Congressmen John Moss and Torbert MacDonald expressed concern about conferring on the President jurisdiction over regulatory agencies created by Congress.¹⁵⁰ They viewed the extension as the latest example of Congress giving up its legislative power to the executive branch.¹⁵¹ Although they referred to these agencies as “independent regulatory agencies,” it is not clear how they defined this term.¹⁵² Viewing such agencies as trustees of powers residing in Congress, they were concerned about converting regulatory agencies into executive agencies.¹⁵³ As a result, they recommended that the House adopt amending language to remove regulatory agencies from the Reorganization Act.¹⁵⁴ The amending language did not exclude all independent establishments, but only certain independent establishments structured as commissions, and one board.¹⁵⁵ There is no reason why the concerns of Congressmen Moss and

¹⁴⁶ *Id.* at 971.

¹⁴⁷ *Id.* at 971–72 (“The committee notes that Congress, in its judgment, has included all of the independent regulatory agencies within the purview of the Reorganization Act since the basic legislation was enacted in 1949. At that time, former President Herbert Hoover asked that there be no exemptions from the provisions of the act.”). In 1947, Congress created the Commission on Organization of the Executive Branch of the Government, the Act of July 7, 1947, ch. 207, 61 Stat. 246 (1947). President Truman appointed Herbert Hoover, former President of the United States, to this commission. *See* Lester B. Orfield, *The Hoover Commission and Federal Executive Reorganization*, 24 TEMP. L.Q. 162, 163 n.7 and accompanying text (1950–1951). The work of this commission contributed to the enactment of the 1949 Reorganization Act. *Id.* at 208.

¹⁴⁸ H.R. REP. NO. 91-80, at 972. (“In the 20 years since enactment various Presidents have sent up a number of reorganization plans involving independent regulatory agencies, some of which were accepted by the Congress and some rejected. The committee feels that the Congress is entirely capable of working its will with respect to these agencies as it has been in the past.”).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.* at 974 (minority views of Hon. John E. Moss and Hon. Torbert H. MacDonald).

¹⁵¹ *Id.*

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (“I urgently request my colleagues in the House to adopt amending language which will remove from the Reorganization Act the regulatory agencies and retain within this body the mandate for action which the Constitution has so clearly presented to us.”).

¹⁵⁵ *See id.* (proposing an exclusion from the definition of “agency” for “any of the following independent establishments or any office or officer in such establishments: The Federal Communications Commission, the Federal Maritime Commission, the Federal Power

MacDonald would be any less valid for subsequent regulatory agencies such as EPA, categorized as independent establishments, that were not organized in the form of commissions or boards. The fact that this proposed amendment was limited to these forms of regulatory agencies may have simply reflected the historical preference for creating agencies in the form of commissions and boards during the earlier years of the modern regulatory state.

The recommendation of the minority congressmen was rejected by the House and never enacted.¹⁵⁶ Therefore, the congressional intent was that regulatory agencies would be subject to reorganization plans. Still, this did not necessarily mean the President had primacy over such agencies, because Congress retained legislative power under the Reorganization Acts. Congress had ultimate power to decide whether a reorganization plan would be enacted, as a matter of law. Congress could exercise that power by either approving or disapproving a reorganization plan submitted by the President.

One year later, Congress expressed its intent regarding the significance of creating “independent establishments,” when it established the United States Postal Service as an independent establishment within the executive branch.¹⁵⁷ This was the result of a direct legislative act of Congress, and not from a reorganization plan filed by the President and approved by Congress under a Reorganization Act. But Congress’ views regarding the autonomy of the United States Postal Service are instructive regarding its intent regarding the autonomy of EPA, another independent establishment created during the same year.

According to the House Committee report, the purpose was to “[c]onvert the Post Office Department into an independent establishment in the Executive Branch of the Government freed from direct political pressures and endowed with the means of building a truly superior mail service.”¹⁵⁸ Taking the Post Office Department out of the President’s cabinet, and converting it into an independent establishment, was central to this objective.¹⁵⁹ Recognizing the problems afflicting the Post Office Department due to the dispersion of responsibilities among different executive agencies,

Commission, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission, the Civil Aeronautics Board, and the General Accounting Office”).

¹⁵⁶ See Act of Mar. 27, 1969, Pub. L. No. 91-5, 83 Stat. 6.

¹⁵⁷ Postal Reorganization Act of 1970, Pub. L. No. 91-375, § 201, 84 Stat. 719, 720 (“There is established, as an independent establishment of the executive branch of the Government of the United States, the United States Postal Service.”).

¹⁵⁸ H.R. REP. NO. 91-1104, at 1 (1970) (House Committee on Post Office and Civil Service), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3650 (“Purpose”). The report is replete with statements about the purpose of depoliticizing the Post Office Department. See, e.g., *id.* at 6 (“[T]he Post Office must be taken out of politics and politics out of the Post Office”).

¹⁵⁹ *Id.* at 6 (“Title I of this bill provides for the total reform and complete modernization of the Post Office Department. It takes the Post Office Department completely out of the President’s Cabinet and out of politics and recasts it in the form of an independent establishment within the executive branch of the government, to be known as the United States Postal Service”).

Congress intended to concentrate responsibilities in a single agency.¹⁶⁰ Indeed, the United States Court of Appeals for the Second Circuit has held that the United States Postal Service's independence derives from its status as an "independent establishment."¹⁶¹ Although it is often asserted that EPA was created by an executive order, it is more accurate to say that it was created by joint action of President Nixon and inaction of Congress, pursuant to the 1966 Reorganization Act. On July 9, 1970, President Nixon transmitted to Congress a reorganization plan creating the EPA, which became law within sixty days when Congress did not oppose the plan through a concurrent resolution.¹⁶² But until the end of his life, President Nixon claimed credit for creating EPA.¹⁶³

The reorganization plan transferred to EPA powers from several executive departments, including the Departments of Interior, Agriculture, and Health, Education, and Welfare.¹⁶⁴ According to President Nixon, the purpose of the reorganization plan was to strengthen enforcement of federal environmental laws and free environmental functions from the constraints of existing executive departments.¹⁶⁵ There was a concern that prejudices of executive departments would interfere with environmental protection, and that no department could objectively spearhead the cause of environmental protection.¹⁶⁶ The President was persuaded by these concerns.¹⁶⁷

¹⁶⁰ *Id.* at 5 ("[A]ll the shortcomings of the Post Office Department are bound up in the fact that responsibility for managing the system is shared by a number of executive agencies and by several congressional committees. Therefore, the only solution to these problems is fundamental reform that puts complete responsibility in a single place, with appropriate safeguards against abuse of that responsibility and appropriate assurances of continued congressional surveillance").

¹⁶¹ *Beneficial Fin. Co. of N. Y. v. Dallas*, 571 F.2d 125, 128 (2d Cir. 1978) (holding that the United States Postal Service no longer enjoyed sovereign immunity and was subject to state wage garnishment laws, as a result of the fact that "Congress removed the USPS from the political sphere and authorized it to act as an 'independent establishment' with powers equivalent to a private business enterprise, such as the power to make contracts, keep accounts, and to acquire and lease property.") (citations omitted).

¹⁶² Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (codified at 5 U.S.C. app. (2006)). By its terms, the effective date of the plan was December 2, 1970, the date recognized as the birth of the EPA. *Id.* The reorganization plan was subsequently published in the Federal Register. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970).

¹⁶³ This was demonstrated by an exchange between the former president and a subsequent EPA Administrator in 1991, three years before Nixon's death. J. BROOKS FLIPPEN, *NIXON AND THE ENVIRONMENT* 231 (2000) ("In 1991 Nixon gave a speech at the Plaza Hotel in New York City. Afterwards, he ran into William Reilly, a Nixon veteran but then Bush's EPA administrator. 'I know you,' Nixon volunteered. 'You're at EPA, and I founded EPA. I'm an environmentalist too.'").

¹⁶⁴ 84 Stat. 2086, § 2.

¹⁶⁵ Message of the President *in* Reorganization Plan No. 3 of 1970, *reprinted in* 5 U.S.C. app. at 700 (2006) ("Despite its complexity, for pollution control purposes the environment must be perceived as a single, interrelated system. Present assignments of departmental responsibilities do not reflect this interrelatedness. . . . In organizational terms, this requires pulling together into one agency a variety of research, monitoring, standing-setting and enforcement activities now scattered through several departments and agencies").

¹⁶⁶ Jack Lewis, *The Birth of EPA*, <http://www.epa.gov/aboutepa/history/topics/epa/15c.html> (last visited Feb. 15, 2014).

Defining the office of the EPA Administrator, the plan provided that the “Administrator shall be appointed by the President, by and with the advice and consent of the Senate.”¹⁶⁸ As a result, the EPA Administrator is subject to the President’s power of appointment. Although the statute is silent on the power of removal, the power to remove is implicit in the power to appoint.¹⁶⁹ The President’s power of appointment does not depend on whether the position is occupied or not.¹⁷⁰ In the case where the position is occupied, it is reasonable to infer that the President has the power to remove an existing Administrator by appointing a new Administrator.

Consequently, given the circumstances of the 1966 Reorganization Act, the Postal Reorganization Act, and the Reorganization Plan No. 3, it was the intention of Congress that EPA be an independent establishment that would not be managed as an executive department. In the language of the Reorganization Acts, and in the historical context of the creation of EPA and the Postal Service, there are two kinds of federal agencies—executive departments and independent establishments. The former were intended to be subject to the influence of the President. The latter were not.

2. *The Presidential View*

In contrast to Congress’s distinction between executive departments and independent establishments, the executive branch has adopted a different conception of what constitutes independence. In the view of the executive branch, the presence or absence of independence turns on whether the President has the authority to remove the head of the administrative agency. Only if Congress has immunized the head of the agency from the power of removal by the President is the agency truly considered an “independent regulatory agency.”

Through its Office of Legal Counsel, the Department of Justice set forth this view in a seminal opinion on the lawfulness of President Reagan’s Executive Order 12291.¹⁷¹ The opinion asserted that Congress is “aware of the comparative insulation given to the independent regulatory agencies,” and that it has delegated rulemaking authority to them “when it has sought to minimize presidential interference.”¹⁷² In contrast, “heads of non-independent agencies hold their positions at the pleasure of the President,” who “may remove them from office for any reason.”¹⁷³ In other words, by delegating power to inferior officers subject to removal by the President under Article II, Congress did not intend to immunize the agency from

¹⁶⁷ *Id.*

¹⁶⁸ 84 Stat. 2086, § 1(b).

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ Proposed Executive Order Entitled “Federal Regulation,” 5 U.S. Op. O. L. C. 59, 61 (1981) (equating nonindependence with the ability to remove the head of the agency, and independence with the inability to remove the head of the agency).

¹⁷² *Id.*

¹⁷³ *Id.*

presidential supervision.¹⁷⁴ While acknowledging statutory limitations on presidential authority, it liberally construed the President's authority to encourage an agency head to consider statutorily permissible considerations, "as long as the President does not divest the officer of ultimate statutory authority."¹⁷⁵ In addition, the President may inform an appointee that the appointee will be removed for failing to make decisions consistent with Presidential policies.¹⁷⁶ Before assuming her position as an Associate Justice of the U.S. Supreme Court, Elena Kagan also presented this view in a law review article in 2001.¹⁷⁷ According to these views, independence depends upon the absence of a power to remove, rather than on classification as an "independent establishment" by Congress.

Executive Order 12291 significantly affects federal agency rulemaking in general, and EPA rulemaking under the Clean Air Act, in particular. Substantively, it requires that a federal agency prepare a cost-benefit analysis for every federal regulatory action, and finalize an action only if the benefits exceed the costs.¹⁷⁸ To this end, it required the preparation of a Regulatory Impact Analysis in connection with every major rule, but only "to the extent permitted by law."¹⁷⁹ Although the order requires an agency to consult with OMB, "[n]othing in this subsection shall be construed as displacing the agencies' responsibilities delegated by law."¹⁸⁰ This qualification is a recognition that the executive branch is subject to the laws of Congress, and may not conflict with a statutory mandate. If there is a conflict, the congressional law will preempt the executive order.¹⁸¹

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 62.

¹⁷⁶ *Id.*

¹⁷⁷ See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001).

¹⁷⁸ Exec. Order No. 12,291, § 2(b), 46 Fed. Reg. 13,193 (Feb. 19, 1981). Four years later, President Reagan expanded upon this executive order by issuing a second executive order that required the submission of a Regulatory Program from each agency subject to the first order. Exec. Order No. 12,498, § 1(a), 50 Fed. Reg. 1,036 (Jan. 8, 1985).

¹⁷⁹ Exec. Order No. 12,291, § 3(a), 46 Fed. Reg. 13,193 (Feb. 17, 1981).

¹⁸⁰ *Id.* § 3(f)(3).

¹⁸¹ While the doctrine of preemption usually contemplates a federal law superseding a state law, it may also contemplate a congressional law superseding a federal executive order (which also has the force of law). See *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1324, 1339 (D.C. Cir. 1996) (holding that executive order that barred the federal government from hiring contractors who hire permanent replacements during a lawful strike was preempted by the National Labor Relations Act, which guarantees management's right to hire permanent replacements). Preemption of an executive order by a congressional law became an issue in public discourse over health care law and policy in advance of the November 2012 presidential election. In response to Republican Senator Tom Coburn's inquiry whether a future President could impact the Patient Protection and Affordable Care Act (PPACA) through an executive order, the Congressional Research Service stated that "[a] President would not appear to be able to issue an executive order halting an agency from promulgating a rule that is statutorily required by PPACA, as such an action would conflict with an explicit congressional mandate." Memorandum from Congressional Research Service to Sen. Tom Coburn (Nov. 14, 2011), available at <http://www.healthreformgps.org/wp-content/uploads/CRS-Report-regarding-presidential-power-over-ACA.pdf> (last visited Feb. 22, 2014).

Subsequent presidents have continued to apply Executive Order 12291, either expanding upon it or limiting it through their own executive orders. President Clinton's Executive Order 12866 reaffirmed the principle that agencies must assess costs and benefits of proposed regulations, and that they may finalize regulations only if benefits exceed costs.¹⁸² That order added a dispute resolution procedure for conflicts between an agency and OMB, under which the President has the ultimate decision.¹⁸³ Still, this procedure is only allowed "to the extent permitted by law."¹⁸⁴ Because the language "to the extent permitted by law" begs the question whether the President may influence EPA decision making, it does not answer the question who has primacy over the promulgation of the NAAQS under the Clean Air Act.

President George W. Bush issued two executive orders that amended certain provisions of President Clinton's Executive Order 12866.¹⁸⁵ Following his inauguration, President Obama revoked those executive orders, leaving Executive Order 12866 unaffected.¹⁸⁶ On the same day, he directed the OMB Director to produce recommendations for a new executive order on federal regulatory review, including "suggestions on the role of cost-benefit analysis."¹⁸⁷

Two years later, President Obama's Executive Order 13563 reaffirmed the principles underlying prior orders, with some changes.¹⁸⁸ Executive Order 13563 established the context for the request by OIRA for Administrator Lisa Jackson to withdraw the ozone rule seven months later, on September 2, 2011. It reiterates the fundamental principle that regulatory actions may be justified only upon a weighing of costs and benefits.¹⁸⁹ But like prior orders, it is qualified by the condition that it "shall be implemented consistent with applicable law."¹⁹⁰

¹⁸² Exec. Order No. 12,866, § 1(b)(6), 58 Fed. Reg. 51,735 (Sept. 30, 1993).

¹⁸³ *Id.* § 7.

¹⁸⁴ *Id.*

¹⁸⁵ Exec. Order No. 13,258, 67 Fed. Reg. 9,385 (Feb. 28, 2002) (amending previous executive order to delete references to the Vice President); Exec. Order No. 13,422, 72 Fed. Reg. 2,763 (Jan. 18, 2007) (amending previous executive order to make "significant guidance documents" subject to review by OIRA).

¹⁸⁶ Exec. Order No. 13,497, 74 Fed. Reg. 6,113 (Jan. 30, 2009) (revoking executive orders and directing the rescission of actions implementing them).

¹⁸⁷ Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 5,977 (Jan. 30, 2009).

¹⁸⁸ Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

¹⁸⁹ *Id.* § 1(a) (asserting that the regulatory system "must take into account benefits and costs, both quantitative and qualitative"); *id.* §1(b) (an agency must "propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify)," and "tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations," and "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits"). Moreover, under Executive Order No. 13,563, "each agency is directed to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." *Id.* §1(c).

¹⁹⁰ *Id.* § 7(c).

These executive orders acknowledge the applicability of statutes enacted by Congress. But they assert considerable presidential authority over federal agencies like EPA, by requiring a cost-benefit analysis as a part of a regulatory action. Quite naturally, this creates a tension which has led to litigation in the federal courts.

3. The Judicial View

Because disputes over presidential authority over EPA rulemaking naturally implicate the separation of powers between the executive and legislative branches of government, it is not surprising that there is not extensive case law on the subject. Under a doctrine of constitutional law, courts will not hear cases involving solely political questions.¹⁹¹ Practical considerations also encourage agencies to work out their differences with the executive branch, without recourse to litigation. Nevertheless, there are a number of judicial decisions that provide guidance as to how the courts might resolve such disputes, should they result in litigation.

a. Humphrey's Executor and the Unitary Theory of the Presidency

A 1935 Supreme Court decision forms the basis for the judicial view.¹⁹² In a dispute over a claim for salary due to a Federal Trade Commissioner, the Court held that the President's power to remove a commissioner under the applicable statute was limited to certain statutory grounds—essentially, “for cause”—and that this was not unconstitutional.¹⁹³ The Court held that Congress has the power to impose restrictions on the President's power of removal.¹⁹⁴ But the decision has long been cited for the proposition that the presence or absence of the President's power of removal determines whether the agency is independent from the President.¹⁹⁵

¹⁹¹ *Baker v. Carr*, 369 U.S. 186, 210–211 (1962).

¹⁹² *Humphrey's Executor v. United States*, 295 U.S. 602, 631 (1935).

¹⁹³ *Id.* at 619, 632.

¹⁹⁴ *Id.* at 629 (“The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.”).

¹⁹⁵ *Id.* at 625–26 (“Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.”).

Even though Congress may impose restrictions on the President's authority to remove an officer, it has not actually done so for the head of every agency.¹⁹⁶ In the case of the EPA Administrator, it has not done this.¹⁹⁷ Because the Administrator is subject to removal by the President, *Humphrey's Executor* supports the conclusion that the President may overrule the Administrator with respect to substantive decisions, including revisions of an ozone standard.

The unitary theory of the presidency holds that federal executive power resides exclusively with the President and is not shared among multiple administrative agency heads.¹⁹⁸ In *Sierra Club v. Costle*, the United States Court of Appeals for the District of Columbia applied a unitary theory of the presidency to a dispute over the docketing of intraexecutive branch meetings and communications between the EPA and the White House. The Environmental Defense Fund alleged that EPA had violated section 307 of the Clean Air Act by failing to record such meetings and communications on the docket of a rulemaking proceeding for proposed new source performance standards for coal-fired power plants under section 111 of the Clean Air Act.¹⁹⁹ The Court held that EPA's failure to docket a rulemaking meeting attended by the President, White House staff, and EPA officials during the postcomment period did not violate the law.²⁰⁰ The reasoning was that EPA did not make an effort to base the rule on information or data from that meeting, which would have triggered a requirement to record the information on the docket.²⁰¹ The Court indicated that when dealing with oral communications between the President and agency officials, the courts should exercise "extraordinary caution" in requiring disclosure above that required by law.²⁰² Central to this decision was the Court's recognition of the unitary theory of the presidency.²⁰³ The implication is that if the President is accused of personally exerting influence on EPA Administrators, the Court would be very reluctant to require disclosure of such influence.

Following its discussion of the unitary theory, the Court made the statement that "[i]n the particular case of EPA, Presidential authority is clear since it has never been considered an 'independent agency,' but always part of the Executive Branch."²⁰⁴ The implication is that only those agencies outside the executive branch may be considered independent agencies. But

¹⁹⁶ See Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (Oct. 6, 1970), *reprinted in* 5 U.S.C. app. at 698 (2006) (implying that Congress gave the President unlimited discretion to remove the EPA Administrator by not limiting the President's removal power).

¹⁹⁷ See, e.g., *id.* (implying that Congress did not limit the President's power to remove the EPA Administrator).

¹⁹⁸ See, e.g., *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) ("The executive power under our Constitution, after all, is not shared—it rests exclusively with the President. The idea of a 'plural executive,' or a President with a council of state, was considered and rejected by the Constitutional Convention.").

¹⁹⁹ *Id.* at 405–408.

²⁰⁰ *Id.* at 407.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 405.

²⁰⁴ *Id.* at 405–06.

this is not necessarily the case, as the overwhelming majority of federal agencies, whether they are considered independent or not, are considered part of the executive branch.²⁰⁵ The Nuclear Regulatory Agency is considered an independent agency, even though it is a part of the executive branch.²⁰⁶

In addition, this reasoning contradicts the congressional distinction drawn in 1970. In converting the Post Office from an executive department into an independent establishment, Congress associated the concept of an “independent establishment” with the characteristic of independence from the President. If the location of an agency within the executive branch were sufficient to deprive an agency of independence, no agency in the executive branch could ever be independent. But according to Congress, the United States Postal Service is independent, even though it was placed in the executive branch.

A recent decision of the United States Court of Appeals for the District of Columbia indicates how it might address conflicts over presidential and EPA decision making under the Clean Air Act. Along with individual citizens, state and local governments challenged the Department of Energy’s decision to withdraw its application submitted to the Nuclear Regulatory Commission (NRC) for a license to construct a permanent nuclear waste repository at Yucca Mountain.²⁰⁷ The Court held that the Department of Energy’s decision to withdraw its application was not final agency action, because the NRC had jurisdiction over the matter. As a result, it dismissed the petition for lack of ripeness and justiciability, without reaching the merits of whether or not the Yucca Mountain project should proceed.²⁰⁸

In his concurring opinion, Judge Kavanaugh expressed dissatisfaction with the fact that it is the NRC, and not the President (through the Department of Energy), that has final authority over whether to terminate the Yucca Mountain project.²⁰⁹ This fact arises out of the holding of the Supreme Court in *Humphrey’s Executor*, and from the fact that the law does not grant the President the power to remove the NRC commissioner.²¹⁰ Judge Kavanaugh’s opinion is premised on the distinction between executive agencies and independent agencies, with independence determined by whether the President may remove the head of the agency.²¹¹ Because of

²⁰⁵ Since it is the function of administrative agencies to execute the law, most agencies are part of the executive branch. While there are a limited number of agencies that serve the needs of the legislative branch, their functions are largely ancillary to the functions of Congress. *See Federal Legislative Branch*, <http://www.usa.gov/Agencies/Federal/Legislative.shtml> (last visited Feb. 22, 2014) (listing 13 agencies that support Congress, including the Library of Congress, the Architect of the Capitol, and the Capitol Police). The Copyright Office is an example of a legislative agency that has authority to regulate a broad area of law, over which Congress has authority under Article I, Section 8 of the U.S. Constitution.

²⁰⁶ *See* Energy Reorganization Act of 1974, 42 U.S.C. § 5841(a)(1), (b)(1) (2006) (“Members of the Commission shall be appointed by the President, by and with the advice and consent of the Senate.”).

²⁰⁷ *In re Aiken County*, 645 F.3d 428, 430 (D.C. Cir. 2011).

²⁰⁸ *Id.* at 433.

²⁰⁹ *Id.* at 438 (Kavanaugh, J., concurring).

²¹⁰ *Id.* at 439.

²¹¹ *See id.*

Humphrey's Executor, the President lacks daily control over large regulatory bureaucracies such as the NRC, despite the fact that the President is politically accountable for their decisions (Obama actually campaigned against the Yucca Mountain project in 2008).²¹² While Judge Kavanaugh's intent was "not to suggest that the case should be overturned," he discusses proposals for enhancing the accountability and effectiveness of independent agencies.²¹³

In a footnote, Judge Kavanaugh rejects the theory that agencies that make expert scientific decisions, like the NRC, should be made independent.²¹⁴ He concludes that the NRC should be treated like EPA and FDA, which are not considered independent even though they have to make expert scientific decisions.²¹⁵ He stated that the President "has the legal authority to make the final decisions" of the Attorney General, the Solicitor General, FDA, and EPA.²¹⁶ Therefore, he would likely hold that the President has the authority to overrule the EPA Administrator with respect to substantive decisions, including revisions of an ozone standard.

But Judge Kavanaugh's opinion actually identifies a way of challenging interference by the President in EPA decision making. In rejecting the theory that agencies that make expert scientific decisions should be independent, he notes that such agencies must make a number of nonscientific legal and policy judgments, in addition to expert scientific decisions.²¹⁷ But these different kinds of decisions trigger different standards of review. The final section of this article addresses why the different standards of review may be used by parties challenging EPA decision making resulting from interference of the President.

Judge Kavanaugh analyzes a series of Supreme Court decisions construing and reaffirming the holding of *Humphrey's Executor*. The most recent pronouncement of the Supreme Court regarding *Humphrey's*

²¹² *Id.* at 442 (explaining that "[b]ecause the power to remove is the power to control, the President lacks control over an independent agency—that is, the President lacks the power to direct or supervise an agency such as the Nuclear Regulatory Commission").

²¹³ *Id.* at 446–48.

²¹⁴ *Id.* at 442 n.2.

²¹⁵ *Id.* ("One theory behind making agencies such as the Nuclear Regulatory Commission independent instead of executive was that independent agencies would make only "expert" scientific decisions and that such expert decisions should be made in an apolitical way. But those independent agencies also have to make a slew of non-scientific legal and policy judgments—such as how to interpret governing statutes, how to exercise policy discretion under those statutes, and whom to charge for violations of the law. Those legal and policy decisions generally cannot be resolved simply by scientific formula. Moreover, executive agencies such as EPA and FDA often have to make the same kinds of expert scientific decisions as independent agencies, yet those agencies have not been made independent. An agency's status as an executive agency does not preclude it from developing and operating with customary independence, such as the Attorney General and Solicitor General possess with respect to many decisions. But the President remains accountable for those officers' decisions. And the President has the legal authority to make the final decisions. There is no doubt, for example, that the Attorney General reports to the President, not the President to the Attorney General.").

²¹⁶ *Id.* at 443.

²¹⁷ *Id.* at 442 n.2.

Executor was the decision in *Free Enterprise Fund v. Public Company Accountability Oversight Board*.²¹⁸ The case involved an action for a declaratory judgment by an accounting firm regarding the constitutionality of the Sarbanes-Oxley Act's creation of the Public Company Accountability Oversight Board.²¹⁹ The Court held that the restriction on the ability of the President to remove a commissioner from the Securities and Exchange Commission (SEC), combined with a restriction on the ability of the SEC to remove a member of the Public Company Accountability Oversight Board, was contrary to Article II's vesting of executive power in the President.²²⁰ The case does not overrule *Humphrey's Executor*; nor does it say that all attempts to limit the President's removal power are unconstitutional. Rather, the decision is limited to the facts of the case.

In his dissenting opinion, Justice Breyer argued for a functional and contextual approach to construing restrictions on Presidential authority.²²¹ The fact that the Board members are technical professional experts was significant in reaching his conclusion that the statute does not significantly interfere with the President's executive power. He reasoned that "this Court has recognized the constitutional legitimacy of a justification that rests agency independence upon the need for technical expertise."²²² As a result, the "justification for insulating the technical experts on the Board from fear of losing their jobs due to political influence is particularly strong."²²³

Justice Breyer's reasoning could form a theoretical basis for construing the Clean Air Act to limit the President's authority over EPA rulemaking. Just as the Public Company Accountability Oversight Board was created to respond to "a series of celebrated accounting debacles," the EPA was created to respond to an environmental crisis—the pollution of the air, water, and the land.²²⁴ Just as the Public Company Accountability Oversight Board "has been thought to exhibit a particular need for independence,"²²⁵ so too was it thought that the EPA should be independent, when it was formed in 1970.²²⁶ However, Justice Breyer's reasoning was rejected by the majority opinion.²²⁷

²¹⁸ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

²¹⁹ *Id.* at 3147–48.

²²⁰ *Id.* at 3148. Initially, the district court granted summary judgment to the Public Company Accountability Oversight Board, finding its creation constitutional. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 WL 891675 (D.D.C. Mar. 21, 2007). Over Judge Kavanaugh's dissenting opinion, the United States Court of Appeals for the District of Columbia affirmed. 537 F.3d 667 (D.C. Cir. 2008). The Supreme Court reversed the D.C. Circuit's decision in part, thereby validating Judge Kavanaugh's dissenting opinion. *Id.* at 3151.

²²¹ *Free Enter. Fund*, 130 S. Ct. 3148–52 (Breyer, J., dissenting).

²²² *Id.* at 3173 (Breyer, J., dissenting).

²²³ *Id.* at 3174 (Breyer, J., dissenting).

²²⁴ *See id.* (citing H.R. Rep. No. 107-414, pp. 18-19 (2002) and analogizing the rationale for increasing securities regulation following the Enron scandal to the rationale for increasing environmental regulation following high-profile environmental disasters in the 1970).

²²⁵ *Id.* (noting Senator Morgan's remarks about "taking these business matters out of politics" on the creation of the Federal Trade Commission (citing 51 CONG. REC. 8857 (1914))).

²²⁶ *See* discussion *infra* Part IV.

²²⁷ *Free Enter. Fund*, 130 S. Ct. 3138 at 3174.

In a nonenvironmental case, the Supreme Court has made statements that EPA is not an independent agency. In *Federal Communications Commission v. Fox Television Stations, Inc.*,²²⁸ the Supreme Court addressed a dispute over Notices of Apparent Liability based on statements by Cher and Nicole Richie at the 2002 and 2003 Billboard Music Awards, when they each uttered words that the FCC found objectionable.²²⁹ On the merits of the case, the majority applied the principle of deference to an FCC policy that considered isolated “fleeting expletives” in a television broadcast to be indecent, holding that it was not arbitrary and capricious.²³⁰ The Court cited the example of EPA to rebut dissenting Justice Breyer’s suggestion that it is “all the more important” that courts review the decision making of independent administrative agencies.²³¹ Stating that the dissent expressed a “heightened scrutiny” for independent agencies, the majority reasoned that “it is hard to imagine any closer scrutiny than we have given to the Environmental Protection Agency, which is not an independent agency.”²³²

In a dissenting opinion in *Freytag v. Commissioner of Internal Revenue*,²³³ Justice Scalia expressed the view that the EPA Administrator is not independent from Presidential control. In that case, the Court rejected a challenge to the authority of the Chief Judge of the Tax Court to appoint special trial judges to hear certain cases.²³⁴ Under the Appointments Clause, for special trial judges to maintain the authority to perform their work, the Commissioner of Internal Revenue had to show that Congress had given the power of appointment to either the President, the courts of law, or the head of a department.²³⁵ The Court rejected the Commissioner’s argument that the Chief Judge of the Tax Court was a department, but held that it was a court of law, thereby validating the appointment.²³⁶ In ruling that it was not a department, the majority noted that the Court had long held that the term “Department” refers to the division of the executive government that is expressly created and given the name of a department, by Congress.²³⁷ The policy underlying this rule is to avoid an “excessively diffuse appointment power.”²³⁸

In his dissenting opinion, Justice Scalia referred to EPA two times to make the point that “all inferior officers can be made appointable by their

²²⁸ 556 U.S. 502 (2009).

²²⁹ *Id.* at 510.

²³⁰ *Id.* at 520.

²³¹ *See id.* at 525, 547.

²³² *Id.* at 525.

²³³ 501 U.S. 868 (1991).

²³⁴ *Id.* at 870.

²³⁵ In relevant part, the Appointments Clause provides that “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, §2.

²³⁶ *Freytag*, 501 U.S. at 884–92.

²³⁷ *Id.* at 886.

²³⁸ *Id.* at 885 (“Given the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint.”).

ultimate (sub-Presidential) superiors.”²³⁹ First, he reasoned that it makes no sense to require an inferior officer of EPA to be appointed by someone other than the EPA Administrator, although that is what the Appointments Clause would strictly require, by vesting the power in the President.²⁴⁰ Second, he rejected the distinction between Cabinet agencies and non-Cabinet agencies as being relevant to the degree of Presidential control, asserting that EPA is not an “independent” agency in the sense of independence from presidential control.²⁴¹ Therefore, Justice Scalia would tend to find that the President may influence the EPA Administrator in making substantive rulemaking decisions.

b. OMB Interference with EPA

The decision of the United States Court of Appeals for the District of Columbia in *Blanchette v. Environmental Protection Agency*²⁴² starts a line of cases illustrating the growing tension between the OMB and the EPA, under federal environmental statutes. That case involved a dispute over an executive order requiring federal agencies to consider costs when promulgating regulations and rules.²⁴³ During the inflationary period of the early 1970s, President Ford had issued an executive order requiring that major proposals for the promulgation of regulations or rules by any executive branch agency be accompanied by a statement certifying that the inflationary impact had been evaluated.²⁴⁴ In developing criteria for identifying regulations and rules subject to the order, the OMB was required to consider the cost impact, as well as the effect on productivity, competition, and supplies of products and services.²⁴⁵ Recognizing the supremacy of congressional acts, the executive order required that federal agencies cooperate with OMB “to the extent permitted by law.”²⁴⁶

When the EPA promulgated a federal implementation plan (FIP) in place of a deficient Connecticut state implementation plan (SIP), EPA’s action was challenged by the Penn Central Transportation Company, which was the owner of an electric power plant that was a source of substantial air pollution.²⁴⁷ The company alleged that the FIP should be invalidated because EPA had failed to prepare an Inflation Impact Statement as required by the

²³⁹ *Id.* at 919.

²⁴⁰ *See id.* at 919–20 (Scalia, J., dissenting).

²⁴¹ *Id.* at 921 (Scalia, J., dissenting) (“[T]he distinction between those agencies that are subject to full Presidential control and those that are not is entirely unrelated to the distinction between Cabinet agencies and non-Cabinet agencies, and to all the other distinctions that the Court successively embraces.”).

²⁴² 551 F.2d 906 (2d Cir. 1977).

²⁴³ *Id.*

²⁴⁴ Exec. Order No. 11,821, 39 Fed. Reg. 41,501 (Nov. 29, 1974).

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 41,501–02.

²⁴⁷ *Blanchette v. EPA*, 551 F.2d 906, 908 (2d Cir. 1977). Section 110 of the Clean Air Act contains provisions allowing EPA to impose a FIP after making a finding that a SIP does not comply with federal requirements. 42 U.S.C. § 7410(c) (2006).

executive order.²⁴⁸ The United States Court of Appeals for the Second Circuit denied the petition for review, holding that the petitioner had not shown that the regulations were “major,” a requirement for the rule to apply.²⁴⁹ By doing so, the Court did not have to address a number of related questions, such as whether the company had a private right of action to enforce the executive order.²⁵⁰ The *Blanchette* decision is important because it foreshadowed the tension between OMB review and EPA’s statutory obligations under the Clean Air Act, which accelerated following the issuance of President Reagan’s Executive Order 12291 in 1981.

In 1984, the United States District Court for the District of Columbia addressed the tension between OMB review and EPA rulemaking in a dispute over the failure of EPA to meet statutory deadlines under the Clean Air Act. In *Natural Resources Defense Council v. Ruckelshaus*,²⁵¹ an environmental organization challenged EPA’s failure to promulgate regulations relating to nitrogen oxides and particulate matter from heavy duty vehicles and engines.²⁵² The 1977 Clean Air Act amendments had required EPA to prescribe standards for the reduction of nitrogen oxides from heavy duty vehicles for the 1985 model year, of at least 75% over the baseline model year of 1979.²⁵³ Despite this clear requirement, the Court noted that “EPA has done virtually nothing to establish those prescribed standards.”²⁵⁴ Although the Court recognized the authority of EPA to avoid its statutory obligations based on “reasons of limited staff or budget,” this defense was not raised by EPA, and the Court rejected it as applied to the facts of the case.²⁵⁵ Therefore, the Court entered an Order requiring EPA to publish a proposed rule and final rule for nitrogen oxides and particulate emissions from heavy duty vehicles, within specified deadlines.²⁵⁶

In setting the specified deadlines in its order, the Court stated that OMB review should be eliminated entirely from the future time frame.²⁵⁷ Further OMB review would be “not only unnecessary, but in contravention to applicable law,” because it would conflict with a congressionally imposed deadline.²⁵⁸ Still, the decision is limited to the facts of the case, which

²⁴⁸ *Blanchette*, 551 F.2d at 908.

²⁴⁹ *Id.* at 909.

²⁵⁰ *Id.*

²⁵¹ Civ. A. No. 84–758, 1984 WL 6092 (D.C. Cir. 1984).

²⁵² *Id.* at *1.

²⁵³ *Id.*

²⁵⁴ *Id.* at *2.

²⁵⁵ *Id.* at *3. This impossibility defense was rooted in the landmark decision of the United States Court of Appeals for the District of Columbia in *Alabama Power Co. v. Costle*, 636 F.2d 323, 359 (D.C. Cir. 1980) (“We acknowledge the principle that an agency official required ‘to do an impossibility,’ should be relieved from sanction. But we emphasized that the agency bore a heavy burden to demonstrate the existence of an impossibility”) (quoting *Natural Res. Def. Council v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1974) (internal quotations omitted)).

²⁵⁶ *Ruckelshaus*, 1984 WL 6092, at *4.

²⁵⁷ *Id.*

²⁵⁸ *Id.* (citing Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981) (exempting from the executive order “[a]ny regulation for which consideration or reconsideration under the terms of this Order would conflict with deadlines imposed by statute or by judicial order . . .”).

involved deadlines that had come and passed and which were clearly violated.

Two years later, the same court addressed another delay in EPA regulations prompted by OMB review. In *Environmental Defense Fund v. Thomas*,²⁵⁹ an environmental organization challenged a delay by EPA in promulgating hazardous waste regulations for underground storage tanks (USTs) pursuant to section 3004(w) of the Solid Waste Disposal Act.²⁶⁰ OMB's substantive changes to the regulations had contributed to EPA's three-month delay in promulgating regulations past the deadline of March 31, 1985.²⁶¹ Substantively, there was a conflict between EPA's desire to regulate all leaks from waste disposal, and OMB's desire to regulate only leaks of waste that could be demonstrated to threaten harm to human health, based on a risk analysis.²⁶² Because of the delay past the statutory deadline, the court granted summary judgment against EPA, but accepted EPA's proposed date for publishing the final regulations in fashioning a remedy.²⁶³

That decision also contemplated the possibility of a legal remedy against OMB for regulatory delay by EPA. Although the Court held that injunctive relief against OMB was not appropriate on the facts of the case, it generally stated that OMB could be enjoined for failing to execute laws enacted by Congress.²⁶⁴ The withholding of approval by OMB so as to encroach upon EPA's independence violates a statutory delegation of authority to the EPA Administrator and is not a valid exercise of presidential power.²⁶⁵ Accordingly, OMB had no authority to use its regulatory review under Executive Order 12291 to delay promulgation of EPA regulations beyond a statutory deadline.²⁶⁶ To the extent a deadline has passed, OMB has

²⁵⁹ 627 F. Supp. 566 (D.C. Cir. 1986).

²⁶⁰ *Id.* at 566–67. The Solid Waste Disposal Act was substantially revised by the Resource Conservation and Recovery Act of 1976, which created an environmental program commonly associated with “cradle to grave” regulation, which applies to waste from the time it is generated to the time it is disposed in the environment. *See generally* Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. § 6901–6992k (2006)); 40 C.F.R. pts. 261–264 (2013). However, it does not regulate all industrial waste. Rather, it only regulates solid waste (as defined by regulations) that is determined to constitute hazardous waste (as defined by regulations). *See* 40 C.F.R. § 261.

²⁶¹ *Env'tl. Def. Fund*, 627 F. Supp. at 570.

²⁶² *Id.* at 569.

²⁶³ *Id.* at 569–70.

²⁶⁴ *Id.* at 568.

²⁶⁵ *Id.* at 570 (“[T]he use of EO 12291 to create delays and to impose substantive changes raises some constitutional concerns. Congress enacts environmental legislation after years of study and deliberation, and then delegates to the expert judgment of the EPA Administrator the authority to issue regulations carrying out the aims of the law. Under EO 12291, if used improperly, OMB could withhold approval until the acceptance of certain content in the promulgation of any new EPA regulation, thereby encroaching upon the independence and expertise of EPA. Further, unsuccessful executive lobbying on Capitol Hill can still be pursued administratively by delaying the enactment of regulations beyond the date of a statutory deadline. This is incompatible with the will of Congress and cannot be sustained as a valid exercise of the President's Article II powers.”).

²⁶⁶ *Id.* at 571.

no authority to delay regulations subject to the deadline. To the extent a deadline has not passed, OMB may only review regulations until further OMB review will result in the missing of a deadline.²⁶⁷

As in the case of Administrator Jackson's withdrawal of the final rule for the ozone NAAQS, OMB caused a delay at a time when EPA was on the verge of an action. In *Environmental Defense Fund*, EPA was ready to announce a proposed rule in the Federal Register, but this was delayed for three months because of OMB.²⁶⁸ But that case involved a failure to meet a statutory deadline, which clearly violated congressional intent. In contrast, Administrator Jackson's withdrawal of the final rule for the ozone NAAQS did not cause EPA to violate a statutory deadline. That presented a subtler question: whether the budgetary and economic pressure exerted by OMB over an EPA Administrator may legitimately influence EPA rulemaking. Where there is no violation of a statutory deadline, it is more difficult to determine the extent of OMB influence and whether it has improperly infringed upon agency rulemaking, in violation of a congressional law.

The controversy over Administrator Jackson's withdrawal of the ozone final rule culminated in a judicial decision. The American Lung Association and other organizations filed a petition challenging the withdrawal of the rule in the Court of Appeals for the District of Columbia.²⁶⁹ The Court dismissed the petition because it lacked jurisdiction over EPA's "non-final decision to defer action."²⁷⁰ In the case of the ozone rule, there was inaction (a decision not to promulgate a rule), rather than action (a decision to promulgate a rule). This is not a bar to a legal challenge under the Administrative Procedure Act, because an action may be brought to compel agency action "unlawfully withheld or unreasonably delayed."²⁷¹ But according to the Supreme Court, a claim under section 706(1) may proceed only if "an agency failed to take a *discrete* agency action" which it is "required to take."²⁷² With respect to the withdrawal of the ozone rule, there was no 'discrete agency action' because there was no violation of a statutory deadline.²⁷³ In addition, this was not action that EPA was "required to take"

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 570.

²⁶⁹ Petition for Review at 1–2, *Am. Lung Ass'n. v. EPA*, No. 11-1396 (D.C. Cir. Feb. 17, 2012).

²⁷⁰ *Am. Lung Ass'n. v. EPA*, No. 11-1396, slip-op at 2 (D.C. Cir. Feb. 17, 2012) (citing *Portland Cement Ass'n v. EPA*, 665 F.3d 177 (D.C. Cir. 2011) (per curiam) and *Natural Res. Def. Council v. EPA*, 643 F.3d 311, 318–20 (D.C. Cir. 2011)). *See also* 5 U.S.C. § 704 (2006).

²⁷¹ 5 U.S.C. § 706(1) (2006).

²⁷² *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (holding that Bureau of Land Management did not violate a statutory requirement to manage public lands in accordance with land use plans, because the plans themselves were not legally binding commitments under Section 706(1) of the APA). The Court did not reach the issue of whether the action was sufficiently discrete to form a basis for compelling agency action under the APA.

²⁷³ *See id.* at 62–63. The Court noted that a "failure to act" must be construed to be limited to a discrete action, like the other terms in the definition of "agency action." *See* 5 U.S.C. § 551(13) (2006) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). As an example of a "failure to act," the Court referred to "the failure to promulgate a rule or take some decision by a statutory deadline." *S. Utah Wilderness Alliance*, 542 U.S. at 63.

because it was not required to take any action at all until March 2013, one year and six months after the withdrawal of the rule.²⁷⁴ The five-year period in which EPA was required to conduct a review commenced in March 2008 and ended in March 2013.²⁷⁵

By contrast, the Eastern District of New York addressed a challenge by an environmental organization to EPA's failure to meet a statutory deadline for the promulgation of regulations under the Clean Air Act in *Natural Resources Defense Council v. Environmental Protection Agency*.²⁷⁶ There was no question that EPA had failed to meet a statutory requirement to publish guidance on motor vehicle inspection and maintenance programs for SIPs by November 15, 1991, one year after the effective date of the 1990 Clean Air Act Amendments.²⁷⁷ The Court considered but rejected the claim for excuse based on impossibility, finding that EPA failed to meet the "heavy burden of demonstrating impossibility or infeasibility."²⁷⁸ On the facts of the case, the court held that OMB review of the draft proposed regulations had not justified EPA's delay.²⁷⁹ Therefore, the court granted summary judgment against EPA, and ordered EPA to publish regulations according to a scheduling order.²⁸⁰

Consistent with that deadline case, the District Court for the District of Arizona in *American Lung Association v. Browner*²⁸¹ granted summary judgment against EPA where EPA failed to meet Clean Air Act deadlines for review of the particulate matter standard, and held that the prospective schedule for promulgation should not include time for OMB review.²⁸² The 1977 Clean Air Act amendments had required EPA to review, and if appropriate, revise the NAAQS for criteria pollutants every five years, starting no later than December 31, 1980.²⁸³ EPA reviewed the particulate matter standard in 1982 and revised the standard in 1987, but did not conduct any further review or revision during the next five years.²⁸⁴ Therefore, the court granted summary judgment to the American Lung

²⁷⁴ See *id.* at 63–64. This requirement necessarily follows from the statutory language "unlawfully withheld." *Id.* at 63. This means that "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be." *Id.* at 65.

²⁷⁵ See 42 U.S.C. § 7409(d)(1) (2006) (requiring a review within each five-year interval after December 31, 1980).

²⁷⁶ 797 F. Supp. 194 (E.D.N.Y. 1992).

²⁷⁷ *Id.* at 195–96.

²⁷⁸ *Id.* at 198.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ 884 F. Supp. 345 (D. Ariz. 1994).

²⁸² *Id.* at 349 ("Review by the Office of Budget Management (OMB) serves no congressional purpose and is wholly discretionary. Therefore, it is not required, and the schedule shall exclude such review."). The case arose at a time before particulate matter was subdivided into PM₁₀ and PM_{2.5} for purposes of regulation.

²⁸³ *Id.* at 346 (citing 42 U.S.C. §7409(d)(1) (2006)).

²⁸⁴ *Id.*

Association and ordered EPA to complete a review and any revision of the particulate matter criteria and NAAQS by January 31, 1997.²⁸⁵

In contrast, Administrator Jackson's review and revision of the ozone NAAQS between 2009 and September 2011 was done within a five-year statutory review period which started on March 12, 2008 or December 31, 2010, depending on how one calculates the five-year period.²⁸⁶ But the controversy over her withdrawal of the ozone final rule centered on the substantive decision, rather than on whether it would cause EPA to violate a statutory deadline. Therefore, the ozone rule withdrawal presents a different situation than those deadline cases.

D. The Special Case of the EPA

In the constellation of federal agencies, EPA is special. The environment includes the air, the water, and the land, which affect everyone. Because it has authority over public health and welfare, EPA's regulatory powers are pervasive.²⁸⁷ While there are other federal agencies that also have authority over the environment, EPA is not an Executive Department and does not reside within an Executive Department.²⁸⁸ Still, within the executive branch, the EPA Administrator reports directly to the President. Because the agency was synthesized in 1970 by joining together functions of different Executive Departments, there has been a strong presidential temptation to manage the EPA as if it were an Executive Department.

EPA's importance among federal agencies is illustrated by its role in the landmark decision of the U.S. Supreme Court in *Chevron v. Natural Resources Defense Council*.²⁸⁹ The Court upheld EPA's interpretation of the definition of a "source" to allow for netting of emissions (the "bubble rule") in determining whether a permit is required under the Prevention of

²⁸⁵ *Id.* at 349.

²⁸⁶ The District Court for the District of Arizona concluded that it was not necessary to decide whether the five-year review period, which ran every five years from the statutory date of Dec. 31, 1980, is a general deadline for all criteria pollutants (which would become due on December 31 of 1985, 1990, 1995, 2000, 2005, and 2010), or whether the deadline for review for each criteria pollutant ran from the date of the last review or revision for that particular pollutant. *See id.* at 347 n.3. In that case, EPA had breached the five-year deadline, regardless of how the period is determined.

²⁸⁷ *See e.g.*, Clean Air Act, 42 U.S.C. §§ 7408–7409 (2006) (authorizing the setting of NAAQS for public health and welfare).

²⁸⁸ By contrast, the Fish and Wildlife Service, which has authority to enforce the Endangered Species Act, is located in the Department of Interior. Fish and Wildlife Act of 1956, 16 U.S.C. § 742b(a) (2006). The National Highway Traffic Safety Administration, which has concurrent authority to regulate mobile sources under the Clean Air Act, is located in the Department of Transportation. Highway Safety Act, 49 U.S.C. § 105(a) (2006). Federal energy law and regulation also come under the authority of an executive department. The Federal Energy Regulatory Commission, which has authority to enforce the Federal Power Act, is located in the Department of Energy. Department of Energy Organization Act, 42 U.S.C. § 7171(a) (2006).

²⁸⁹ 467 U.S. 837 (1984).

Significant Deterioration provisions of the 1977 Clean Air Amendments.²⁹⁰ Under the “bubble rule,” a facility undergoing a modification that increases air emissions may offset resulting decreases in other source-wide emissions, in determining whether the emissions increase requires a pre-construction permit.²⁹¹ *Chevron* provides the familiar two-step process for review of agency action that has been applied to all federal agencies: 1) the court must give effect to the unambiguously expressed intent of Congress, and 2) if the statute is silent or ambiguous, the court must determine whether the agency’s action is based on a permissible (reasonable) construction of the statute.²⁹²

Chevron involved a dispute between an industrial company and EPA, rather than a dispute between EPA and the President. In addition, the Court’s holding addressed the interaction between Congress (the legislative delegating authority) and EPA (the agency entrusted with delegated powers), rather than between Congress and the President, or between the President and EPA. Nevertheless, in one paragraph the Court had something to say about the influence of the President on EPA rulemakings. In language reminiscent of President Roosevelt’s Message to Congress on the Reorganization Act, the Court recognized that administrative agencies may properly be influenced by the President, because it is the President, and not the agency head, who is politically accountable to the American public.²⁹³ Scholars have identified the *Chevron* decision as an important factor in the subsequent growth of presidential power over federal agencies.²⁹⁴ But, this is not necessarily a logical result of the *Chevron* decision and subsequent case law.

Whether a court will apply *Chevron* deference depends on the nature of the agency decision. Recognizing the various levels of judicial deference to agency decision making that have evolved since the *Chevron* decision, courts have noted that deference to EPA is at its highest when it is acting in

²⁹⁰ *Id.* at 866.

²⁹¹ *Id.* at 855–56.

²⁹² *Id.* at 842–43 (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” (footnotes omitted)).

²⁹³ *Id.* at 865–66 (“In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration’s views of wise policy to inform its judgments. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.”).

²⁹⁴ See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 382 (2008) (“The Reagan administration won a key victory for presidential power in the 1984 Supreme Court decision . . . [t]his led to a major increase in the power of the president to control the executive branch.”).

matters that are highly scientific or technical.²⁹⁵ Because presidential influence typically is motivated by political or economic considerations, rather than scientific or technical considerations, presidential influence tends to make EPA rulemaking weaker in the face of a legal challenge. In the case of Presidents Nixon, Bush, and Obama, the alleged interference was motivated by a desire to weaken air quality standards, rather than to strengthen them. In similar cases, the EPA Administrator would be on weaker ground in deferring to presidential influence, as compared with decisions based on science.

E. Conclusions

Based on the circumstances surrounding the creation of EPA as an “independent establishment” in 1970, there is a legislative view that Congress intended for EPA to be free from presidential politics. In contrast, there is an executive view that the President may influence the decisions of the EPA Administrator through the power of removal, which is implicit in the power of appointment. There is a judicial view that is generally consistent with this executive view. Congress could reconcile the opposing views by limiting the President’s power to remove the EPA Administrator or by otherwise amending the Clean Air Act, but it has not demonstrated the political will to do so. Therefore, a reviewing court would likely hold that the President may influence the decisions of the Administrator. But under applicable standards of review and given the nature of the historical tension, presidential influence over EPA rulemakings under the Clean Air Act tends to make agency decisions more vulnerable to challenge, than if they were based on science.

²⁹⁵ Venue for judicial review of final action by EPA in promulgating an NAAQS under the Clean Air Act lies in the United States Court of Appeals for the District of Columbia. 42 U.S.C. § 7607(b)(1) (Supp. 2006). That court has routinely stated that the review of technical and scientific determinations merits the highest level of deference. *See Citizens Coal Council v. EPA*, 447 F.3d 879, 890 (6th Cir. 2006) (“Where the rulemaking involves review of the agency’s technical or scientific evaluations and determinations, the highest level of deference to the agency is to be applied,” citing *Baltimore Gas & Elec. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)); *Am. Farm Bureau Fed’n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (“We give an ‘extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise,’ reviewing the agency’s action to ‘ensure that the EPA has examined the relevant data and has articulated an adequate explanation for its action,’” citing *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003)); *Coal. for Responsible Regulation v. EPA*, 684 F.3d 102, 120–22 (D.C. Cir. 2012) (holding that EPA’s Endangerment Finding for greenhouse gas emissions from motor vehicles met the standard of deference set forth in *American Farm Bureau Federation*); *Coal. for Responsible Regulation, Inc. v. EPA*, 2012 WL 6621785, at *1 (D.C. Cir. 2012) (denying rehearing en banc, in part because “EPA’s scientific judgment about the causal relationship between greenhouse gases and climate change is a scientific determination entitled to ‘an extreme degree of deference,’” citing *Am. Farm Bureau Fed’n*, 559 F.3d at 519).

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