SEPARATION OF POWERS LEGITIMACY: AN EMPIRICAL INQUIRY INTO NORMS ABOUT EXECUTIVE POWER

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Presidential fingerprints inevitably can be found on almost any highly consequential action undertaken by an executive branch agency. This is true even when agencies refrain from taking action. For example, when the Administrator of the U.S. Environmental Protection Agency (EPA) announced in 2011 that she would withdraw a proposal to tighten federal smog standards, her announcement came only after a White House official and the President sent her memos making it abundantly clear that the President wanted her take that step.[1] When the Department of Health and Human Services and the Treasury Department announced, during the period from 2012 to 2014, a series of delays in the enforcement of various requirements of the Affordable Care Act, the President and his staff were deeply involved in crafting these work-arounds that made it easier to implement a complicated statute.[2] And when the Secretary of the Department of Homeland Security (DHS) sent a memo to the heads of the U.S. Immigration and Customs Enforcement and two other DHS agencies in late 2014, telling them to refrain from deporting millions of undocumented immigrants who met certain criteria, the President himself made a televised address to the nation announcing these sweeping immigration deferrals as if they were solely his actions being taken.[3]

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[1] Lisa Jackson, Statement on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), https://yosemite.epa.gov/opa/admpress.nsf/1e5ab1124055f3b28525781f0042ed40/e41fbc47e7ff4f13852578ff00552bf8!OpenDocument (announcing that EPA would "revisit" its proposed revisions to the national ozone standards); Cass R. Sunstein, Letter to Administrator Jackson (Sept. 2, 2011), https://www.whitehouse.gov/sites/default/files/ozone_national_ambient_air_quality_standards_letter.pdf; Barack Obama, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), https://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards.

[2] For an account of the Obama Administration's delays in the implementation of a health care reform law known popularly by the President's name, see Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. (2016) (Part I.B).

[3] Jeh Charles Johnson, Memorandum on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf; Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-

In each of these cases, as with others across many other administrations, White House intervention played an important, if not arguably decisive, role in the resulting outcomes.[4] Yet the underlying legislation in most of these cases specifically delegated implementing authority to the head of each agency, not to the President. In such cases, may the President lawfully become the decisive factor in determining what actions an administrator takes or does not take?

From the nation's earliest days, Presidents have tended to assume that, as the head of the Executive Branch and as the official who can remove the heads of most agencies at will, Presidents do have the authority to direct what executive branch agencies do. But the nature and extent of the President's directive authority has also been vigorously debated by legal scholars,[5] especially recently during the George W. Bush Administration, with its emphasis on unitary executive theory, and through the duration of what President Obama's political opponents have called his "imperial" presidency.[6]

The continuing debate over what is known as the President's directive authority is but one of the many separation of powers issues that has confronted courts, scholars, government officials, and the public in recent years. The Supreme Court, for instance, has considered whether the President possesses the power to make appointments of agency heads without Senate confirmation during certain congressional recesses.[7] The Court has passed judgment recently, but has yet to resolve fully, Congress's authority to constrain the President's power to remove the heads of administrative agencies,[8] as well as considered the limits on Congress's ability to delegate legislative authority to other rulemaking institutions.[9] In these and other cases involving disputes over inter-branch relations, courts and academic analysts have perennially grappled with both legal interpretation as well as

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immigration (announcing "actions I'm taking" to provide deferrals of deportation to certain undocumented immigrants). *See generally* Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. (2016).

[4] When those outcomes seem to make a systemic retreat from the enforcement of statutory rules, the question arises whether Presidents have failed to fulfill their constitutional obligation to "take care that the laws be faithfully executed." Neither the Take Care Clause itself nor the Supreme Court's interpretation of it makes any answer clear. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. (2016) ("[I]dentifying the line between a permissible exercise of prosecutorial discretion and an impermissible dispensation of the law seems very much like a matter of degree whose limits are rather subjective and difficult to define in a principled way")

[5] *See infra* Part I.

[6] *See* Parker, *supra* note 6.

[7] *See* Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550 (2014) (finding that the President's recess appointments, made in a three-day period between two pro forma sessions of the Senate, were invalid).

[8] Free Enterprise Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477 (2010).

[9] *See* Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225 (2015) (holding that Amtrak was a governmental entity rather than an autonomous private entity).

constitutional history and political theory. Yet as much as these cases may involve law, history, and theory, they also at least implicitly raise decidedly *empirical* questions about law's effects on governmental behavior as well as about its impact on the legitimacy of constitutional government.

Empirical questions are embedded throughout all different forms of law, but the empirical effects of structural aspects of constitutional law have so far largely escaped systematic study.[10] Admittedly, political scientists have studied the three branches of government and their interactions extensively, but what remarkably has escaped systematic empirical study have been the relationships between different choices about separation of powers doctrine and outcomes in terms of governmental behavior or public attitudes about governmental legitimacy. This Article offers an initial foray into this largely unexplored terrain, providing a distinctive empirical investigation of public norms about executive power and how doctrinal choices can affect perceptions of the legitimacy of legal judgments. We focus here on Presidents' efforts to get involved in shaping what agencies do.[11]

Part I begins with a brief overview of the main legal issue motivating this Article: the legal limits on a President's role in shaping the action or inaction by the executive branch officials appointed to lead administrative agencies. We explain how norms constraining presidential involvement in administration can be conceived in the form of either standards or rules. We explain why a leading conception of an applicable standard in this context – a standard that distinguishes between presidential *oversight* and *decisionmaking* – is unlikely to do much if anything to constrain Presidents from controlling administrative agencies. We hypothesize, though, that such a standard could undermine law's legitimacy, especially given that it is applied in a setting where judgments about the standard's applicability will be politicized. A norm in the form of a rule would, we predict, turn out to be more resistant to concerns about illegitimacy.

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[10] Of course, in recent decades an important and growing body of empirical research on administrative law has arisen; however, most of this work has focused on administrative procedures rather than on structural issues of separation of powers. *See, e.g.,* Cary Coglianese, *Empirical Analysis and Administrative Law*, 2002 UNIV. ILL. L. REV. 1111 (2002). More generally, research on procedural justice has informed

[11] Some social science research has examined Presidents' power in issuing executive orders. *See, e.g.,* KENNETH R. MAYER, WITH THE STROKE OF THE PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER (2002). Other work has even investigated patterns of judicial review of executive orders. *See, e.g.,* WILLIAM HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003) (Chapter 6). One study has suggested that doctrinal differences between presidential authority in foreign and military affairs versus domestic affairs helps explain patterns of judicial outcomes in cases involving executive orders. Craig R. Ducat & Robert L. Dudley, *Federal District Judges and Presidential Power During the Postwar Era*, 51 J. POL. 98 (1989). Yet none of the existing work examines what interests us here, namely how the doctrinal form of separation-of-powers law may affect perceptions of the legitimacy of law and legal institutions.

Part II details the four empirical studies we conducted to examine the expectations introduced in Part I. We begin by describing our research methods, which comprise vignette-based surveys, and then proceed to report our results. Taken together, the surveys provide a revealing window into public perceptions about responsibility for governmental actions, disagreements between Presidents and the heads of agencies, and how the form of legal norms can shape perceptions of legitimacy. We find, among other things, that people's judgments about the legitimacy of constitutional law rulings can be affected *by the form that* legal doctrine takes, even when controlling for any substantive differences in the law. Specifically, our evidence indicates that public views about the legitimacy of court decisions can be negatively affected by standard-like formulations of separation-of-powers doctrine relative to a formulation based upon a bright-line rule.

Part III concludes by highlighting the implications of our findings. Most broadly, our empirical results imply that what appears to be the prevailing view about the applicable doctrinal standard on executive power should be reconsidered. Our results draw into question how much positive value, if any, comes from a standard based on a distinction between oversight and decisionmaking. Not only is the standard extremely difficult if not impossible to operationalize in any clear manner, but our results suggest that, irrespective of such a standard, Presidents do face other meaningful constraints, if nothing else due to the responsibility the public assigns to Presidents when they start to get involved in administration. Perhaps more striking than the prevailing standard's limited if nonexistent positive value, our results indicate that such a standard in this context brings with it some negative value, in terms of a loss to law's legitimacy. Public attitudes about legal legitimacy are negatively affected by the invocation of standard-like norms on executive power, while by comparison such legitimacy remains resilient when rule-like norms prevail.

I. Executive Power Norms and Law's Legitimacy

This Article brings new empirical inquiry to an old debate over the role of presidents in directing the daily functioning of government by administrative agencies. The impact of federal administrative agencies is hard to overstate. They administer Social Security, enforce civil rights laws, regulate everything from food safety to nuclear power plant operation, and perform every domestic function of federal government that affects the lives of Americans. Congress may adopt about a hundred statutes per year, but the more than one hundred administrative agencies like the Department of Transportation and Environmental Protection Agency collectively adopt several thousand new regulations every year. Officials at these myriad federal

agencies routinely exercise discretion in ways that have enormous consequential effects on individual and societal welfare—for good or ill.[12]

If much of government today is administrative government, who bears the responsibility and authority for directing administration? One answer: the heads of administrative agencies, whether cabinet secretaries, commissioners, or administrators. By their specific terms, most statutes delegate administrative authority specifically to these heads of administrative agencies. For example, the Occupational Safety and Health Act delegates authority to the Secretary of Labor: "*The Secretary* may by rule promulgate, modify, or revoke any occupational safety or health standard."[13] The Clean Air Act similarly delegates authority to issue automobile emissions standards to the Administrator of the Environmental Protection Agency (EPA):

> *The Administrator* shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, *which in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.[14]

If an automobile manufacturer fails to comply with the vehicle emissions standards adopted by the EPA, the Clean Air Act further states that "[t]he Administrator may commence a civil action to assess and recover any civil penalty" provided for under the statute.[15] Much the same can be said for all other federal agencies and their underlying statutes.

And yet congressional delegations of authority to agencies are also made against the backdrop of a constitutional system of separated powers, with Article II of the Constitution stating that "the executive power shall be vested in a President of the United States."[16] That same article gives presidents the authority to appoint the heads of these administrative agencies, with senatorial advice and consent. Presidents also have the power to remove the heads of administrative agencies on an "at will" basis, at least absent any legislative restriction to the contrary.[17]

Throughout U.S. history, presidents have assumed the authority to lead the administrative parts of government, as an integral exercise of executive authority. Supporters of a "unitary executive" theory argue that by vesting executive authority

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[12] Administrators can produce these significant consequences to the public through both their action and inaction. Throughout this Article, we mean "action" to encompass both action and inaction. *Cf*. Administrative Procedure Act, 5 U.S.C. §551(13) (defining "agency action" to include "failure to act").

[13] Occupational Safety and Health Act, 29 U.S.C. § 655 (1970) (emphasis added).

[14] Clean Air Act, 42 U.S.C. § 7521 (1963) (emphasis added).

[15] 42 U.S.C. § 7524.

[16] U.S. CONST. art. II.

[17] Myers v. United States, 272 U.S. 52 (1926).

in one president, the Constitution authorizes the president to coordinate and ultimately direct the actions taken by the appointees that head up administrative agencies.[18] In recent years, Presidents of both political parties have publicly proclaimed their authority to direct the administration of the federal government. President George W. Bush famously declared, "I'm the decider,"[19] and President Barack Obama has asserted, "I've got a pen to take executive actions where Congress won't."[20]

Scholars have sharply debated the nature and extent of such claimed presidential authority to direct administrative agencies. One side of this debate treats the president's directive authority as virtually unconstrained, whether as a matter of constitutional law (the unitary executive theory) or as a matter of statutory presumption. As a law professor, for example, Justice Elena Kagan articulated the statutory form of this view well when she argued for "broad control" by the President over the actions of administrative agencies, concluding that Presidents presumptively possess the power to impose legally binding orders for administrative action, absent some clear statutory prohibition to the contrary.[21]

The other side of the debate argues that the president's directive authority is constrained, even absent a specific statutory prohibition, but that the nature of the constraint is standard-like. In other words, the President is constrained, but not so constrained as to be walled off from administrative agencies altogether. This side of the debate recognizes that Presidents can oversee the work of administrative agencies; after all, Article II authorizes presidents to "require" opinions from agency heads, and it imposes an obligation on the President to "take care" that laws are "faithfully executed."[22] But under this view, presidents are constrained only to *oversee* agency actions; they cannot *make decisions* for them.[23]

This widely held view results in a standard-like executive power norm because the line between permissible presidential oversight and impermissible decisionmaking is far from clear. As Professor Peter Strauss has noted, the distinction between the President as overseer and the President as decider is "subtle."[24] Nevertheless, proponents of a standard based on this distinction argue

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[18] *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008).

[19] Ed Henry and Barbara Starr, *Bush: 'I'm the decider' on Rumsfeld*, CNN (April 18, 2006), http://www.cnn.com/2006/POLITICS/04/18/Rumsfeld.

[20] Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR (Jan. 20, 2014), http://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone.

[21] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

[22] U.S. CONST. art. II.

[23] *See, e.g.*, Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487 (2011); Peter L. Strauss, *Overseer, or 'the Decider'? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

[24] Strauss, *supra* note 29.

that, despite the inherent difficulty in line-drawing, such a standard offers an important source of executive constraint.

The doctrinal debate over presidential administrative authority can be cast, at least in part, as a debate between rules versus standards.[25] In contrast to a standard based on a subtle distinction between oversight and decisionmaking, an alternative does exist in the form of a bright-line rule, such as one that declares that, when a statute gives authority to the head of an agency, only that agency head can officially authorize agency action. Such a rule can be clearly operationalized based on who signs the relevant documents announcing policies or authorizing agency actions: for policies or actions to take legal effect, applicable documents must be signed by the appropriate agency head.[26]

Admittedly, such a hyper-formalistic, bright-line signature rule can be accommodated within the fuzzy contours of an overseer-decider standard, for if a President were to sign a policy or approval document instead of the agency head, the signing itself would constitute evidence that the President had impermissibly crossed the line and make the decision for the agency. The key difference between a rule-based approach and a standard in this context presumably lies in the standard's underlying assumption that something more than just a President's signature might demonstrate that a President has gone too far. The bright-line rule approach makes the constraint on presidential involvement clear, as any presidential action short of signing the document is permitted; the overseer-decider standard, by contrast, suggests some additional, albeit murky, constraints on presidential involvement.

As a practical if not legal matter, determining whether the Constitution imposes a rule or a standard on executive power in this context has no chance of resolution by the courts. For one, the chances of someone taking a claim to court, and then having the court deciding to pass judgment on the matter, are virtually nil.[27] Presidents and their administrators will certainly not be suing themselves; standing will be a barrier for others; and the courts will continue to be very reluctant to entertain political questions, especially those pertaining to the internal management of the executive branch.[28]

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[25] On rules and standards, see, e.g., Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983).

[26] For a discussion of this type of executive power norm and a discussion of its strength in allowing agency heads to resist pressure from White House officials, see Cary Coglianese, What's Wrong With Decisional Limits on Presidential Control of Administrative Agencies (2014) (unpublished manuscript) (on file with the University of Pennsylvania Law Review).

[27] An empirical study of litigation filed by private parties against government agencies reveals the virtual absence of judicial constraint. Only about 1 percent of all executive orders issued from 1942-1998 were subjected to a judicial challenge, and even in those few adjudicated cases the President's authority was affirmed 83 percent of the time. HOWELL, *supra* note 11, at Fig. 6.2.

[28] *See* Coglianese, *supra* note 32.

But there is another important reason the debate between bright-line rules and subtle standards in this context will not be resolved by the courts: any purported standard based on an overseer-decider distinction can be easily interpreted and applied in such a way as to be as non-constraining as a bright-line signature rule. In other work, one of us has shown how easy it is for presidents to circumvent the overseer-decider standard and achieve their policy objectives in a fully legal manner.[29] Presidents can and do make decisions and impose them on their administrators; however, especially under conditions of secrecy, they can also easily adopt several techniques to circumvent the supposed legal limitation on their making of decisions. For example, presidents can engage in "we-speak," proclaiming that decisions have been made by "the Administration."[30] They can also make "requests" rather than impose directives, even though it is known that such requests are not really asking for favors.[31] Absent any meaningful prospect of judicial enforcement, and with easy ways of circumventing the subtle overseer-decider standard, the benefits that this standard could potentially deliver in terms of protecting administrative agencies from presidential overreach would appear to be trivial or merely symbolic, if not altogether non-existent. If that is so, we might ask whether there is nevertheless anything wrong with clinging to an overseer-decider standard. After all, a standard that lacks benefits may also lack any costs. Yet with the overseer-decider standard, there is the real possibility it is not as innocuous as it might seem. It may actually present some costs in terms of weakening law's legitimacy. If the standard is so subtle that determining whether a President has crossed the line between oversight and decisionmaking rests in the eyes of the beholder, then presidential involvement in the administrative state will remain continuously susceptible to criticism for being unconstitutional, especially in times of divided government. In such an inherently political climate, practically any consequential attempt a President makes to shape the course of administrative agencies will be prone to criticism by politicians of the opposite party. When these criticisms are couched in terms of claims "that the Constitution imposes an overseer-versus-decider limit," the risk arises of "undermining administrative law by unnecessarily politicizing it and thereby diminishing the respect for it that is needed to sustain its behavioral force."[32]

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[29] *Id.*

[30] *Id.* at 14.

[31] *See id.* at 15-16 ("[I]t is quite easy for a President to make clear what he expects his political appointees to do when it comes to domestic policy matters such as rulemaking, without explicitly commanding those appointees to adopt a rule. He can simply 'request' that they do so.").

[32] *Id.* at 4. For a general explication of the relationship between legal legitimacy and compliance, see TOM TYLER, WHY PEOPLE OBEY THE LAW: PROCEDURAL JUSTICE, LEGITIMACY, AND COMPLIANCE (2006). Political scientists have shown empirically that the legitimacy of the Supreme Court declines in the face of "politicization" (i.e., when people "substitute a political frame for a legal

Consider the following example of how a standard might lead to such unnecessary politicization.[33] Under the Clean Air Act, automobile emissions standards are normally set by the federal EPA. But Section 209 of the Act gives the EPA Administrator the authority--indeed, the duty-–to grant California a waiver to create its own vehicle emissions standards.[34] As with other delegations, the statute specifically names the administrator, not the president: "*The Administrator* shall. . . waive application of this section. . ." and "No such waiver shall be granted if *the Administrator* finds. . ." and so forth.[35] During the George W. Bush Administration, the EPA announced a denial of an application California had filed to be allowed to adopt greenhouse gas emissions standards for automobiles-–something the federal government had yet to impose at that time.[36] The circumstances under which the EPA announced its denial-–namely, shortly after a meeting the EPA Administrator attended at the White House-–gave rise to charges that President Bush had overstepped the overseer-decider line. In a congressional hearing following the EPA's announcement, then-Representative Henry Waxman, a Democrat, rebuked then-Administrator Stephen Johnson, stating that "The law does not provide that this is the president's decision."[37] And yet barely a year later, within one week of assuming office, President Obama issued a formal memo to EPA directing the new administrator to reconsider the agency's denial of California's waiver request.[38] In a speech that accompanied the release of his memorandum, President Obama made it clear that the days when "Washington stood in [the] way" should come to an end.[39] And Mr. Waxman's response was nothing but laudatory praise. "President Obama is taking the nation in a decisive new direction that will receive broad support across the country," Waxman approvingly declared.

Democrats like Henry Waxman are not the only ones who flip-flop.[40] Examples abound on both sides of the aisle. Politicians on the political right tend to view Democratic presidents' influence as impermissible (i.e., *deciding*), while seeing

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frame"), such as during politically contentious confirmation battles. JAMES L. GIBSON AND GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS n. 11 (2009).

[33] For a further discussion of the episode described in the following example, see Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 642-44 (2010).

[34] 42 U.S.C. § 7543(b).

[35] *Id.*

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

[37] EPA's New Ozone Standards: Hearing Before the Oversight and Government Reform Comm., 110th Cong. 146 (2008).

[38] Memorandum for the Administrator of the Environmental Protection Agency, 74 Fed. Reg. 4905 (Jan. 26, 2009).

[39] Remarks on Energy, Weekly Comp. Pres. Doc. 1 (Jan. 26, 2009).

[40] For a recent discussion, see Eric A. Posner and Cass R. Sunstein, Institutional Flip-Flops (2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2553285.

the same influence by Republican presidents as permissible (i.e., *oversight*). House Republicans who were silent about President George W. Bush's assertions of presidential directive authority, for example, have sharply criticized executive actions taken by President Obama.[41] They have even authorized the filing of litigation against the administration over certain of its executive actions taken under the Affordable Care Act.[42]

The very predictability of partisan posturing raises pivotal questions relevant to the choice between rules and standards over executive power: What happens to law's legitimacy when it enters into a polarized political contestation? When Henry Waxman criticizes President Bush for action contrary to "the law," does this risk contaminating the law with partisanship, undermining its legitimacy? Might the very subtly of the overseer-decider distinction actually encourage politicians to exploit it as a political tool and conceal partisan moral or political arguments as l egal arguments?

If such outcomes can be expected, then what might appear to be a plausibly attractive, even if unenforceable, doctrinal standard could ultimately prove harmful. The overseer-decider standard might not only fail to deliver benefits in terms of reducing presidential influence over administrative decisions, it might also generate tangible costs in terms of diminishing the legitimacy of law. The very sponginess of the overseer-decider standard, when applied in such a politically charged environment (inherent in separation of powers disputes), could undermine the respect for law and legal institutions and, at the margin, might reduce its ability in other settings to deliver real benefits in terms of shaping governmental and private-sector behavior. In short, under the overseer-decider standard, there may be the risk that the Constitution will "come to serve simply as a rhetorical football in a highly polarized ideological game."[43]

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[41] *See* Ashley Parker, *"Imperial Presidency" Becomes Republicans' Rallying Slogan*, N.Y. TIMES (Mar. 31, 2014), http://www.nytimes.com/2014/04/01/us/politics/imperial-presidency-becomes-republicans-rallying-slogan.html.

[42] Press Release from Speaker of the House John Boehner, *House Files Litigation Over President's Unilateral Actions on Health Care Law* (Nov. 21, 2014), *available at* http://www.speaker.gov/press-release/house-files-litigation-over-presidents-unilateral-actions-health-care-law. This suit is, however, based on grounds other than excessive directive authority.

[43] Coglianese, *supra* note 32. This is not to deny that some constitutional questions, even nonjusticiable ones, might be worth debating in a political setting. *See, e.g.*, KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). Rather it raises an empirical question: at what cost might come whatever benefits such a political debate produces? If such costs are greater than the benefits (at least with respect to some doctrinal questions), this would hardly seem irrelevant to the consideration of doctrinal choices. Moreover, a constitutional position that only seems to encourage those costs, without ever yielding any corresponding benefits, would seem particularly worrisome.

II. Public Perceptions, Executive Power, and Legal Norms

To assess the potential legitimacy impacts associated with different executive power norms, and learn more about how the public assigns responsibility for executive action, we conducted four vignette-based surveys. Vignette-based research has been used extensively for years in the social sciences,[44] and it has also been relied upon in a number of areas of the law, including torts,[45] criminal law,[46] and contracts.[47] To our knowledge, it has yet to be used to inform doctrinal decisions and scholarly deliberations in the domain of administrative law.[48]

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[44] *See, e.g.*, LEE HAMILTON & JOSEPH SANDERS, EVERYDAY JUSTICE: RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES 89-109 (1992) (describing the vignette method utilized to measure perceptions of responsibility in wrongdoing within everyday life in the United States and Japan).

[45] *See, e.g.*, W. Jonathan Cardi et al., *Does Tort Law Deter Individuals? A Behavioral Science Study*, 9 J. EMPIRICAL LEGAL STUD. 567, 576-590 (2012) (measuring the deterrent effect of a tort legal regime through vignettes that ask how individuals would behave in certain real-world situations); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L. J. 2071, 2095 (1998) (discussing a series of vignettes on personal injury cases to measure judgments and attitudes toward punitive damages in tort suits).

[46] *See, e.g.*, Mark Kelman & Tamar Admati Kreps, *Playing with Trolleys: Intuitions About the Permissibility of Aggregation*, 11 J. EMPIRICAL LEGAL STUD. 197, 203-209 (2014) (using a vignette study to measure how individuals would respond to the classic trolley problem in criminal law studies); Trent W. Maurer & David W. Robinson, *Effects of Attire, Alcohol, and Gender on Perceptions of Date Rape*, 58 SEX ROLES 423, 426 (2007) (discussing the design involving a two-part heterosexual date rape vignette for U.S. undergraduates to measure students' perception of sexual assault); Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 273 (2012) (describing an experiment using vignettes to test the judgments of participants regarding the elements of criminal liability and whether that is colored by inferences of the moral character of the transgressor).

[47] *See, e.g.*, Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary versus In-Kind Remedies*, 2013 U. ILL. L. REV. 152, 159-74 (2013) (using vignettes to measure what contractual legal remedy people prefer); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1762 (2014) (using vignette studies on consumer consent over fine print in contracts).

[48] Cass Sunstein has recently used vignette surveys to study public perceptions about certain kinds of regulatory design – that is, designs for how agencies or legislatures can structure rules to try to shape private behavior – but not about the design of norms governing administrative behavior. *See* Cass R. Sunstein, *Do People Like Nudges?*, ADMIN. L. REV. (forthcoming), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2604084; Cass R. Sunstein, Which Nudges Do People Like? A National Survey (2015), (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619899. Others have used non-vignette surveys, of course, in effort to speak to the design of administrative procedures. *See, e.g.,* David L. Markell & Tom R. Tyler, *Using Empirical Research to Design Government Citizen Participation Processes: A Case Study of Citizens' Roles in Environmental Compliance and Enforcement*, 57 KAN. L. REV. 1 (2008); Laura I. Langbein & Cornelius M. Kerwin, Regulatory *Negotiation versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence*, 10 J. PUB. ADMIN. RES. & THEORY 599 (2000).

Our respondents participated in short survey studies where they read a scenario about a particular decision involving the President, the Treasury Secretary, and various other actors. Each subject was randomly assigned to one of a number of conditions where we varied aspects of the scenario to determine which factors influence perceptions of decision making, as well as the legality and appropriateness of the President's actions and the overall legitimacy of the legal system.

The first two studies varied the level of action taken by the President. The Decisionmaking Study looked at who respondents perceived the "decider" to be in the vignette, while the Responsibility Study looked at who respondents thought deserved blame or credit when the results of the governmental actions in the vignette were said to turn out poorly or well. A third study, the CIV. Disagreement Study, varied whether the President and Treasury Secretary agreed or disagreed on the desirable outcome, and who actually authorized the decision. The final study, the DV. Legal Norm Study, used a different scenario involving the postponement of a compliance deadline and varied whether the legal norm that was supposed to guide the President's action was a rule or a standard.[49]

Drawing on the findings from these surveys we can begin to understand better how people think about the separation of powers, but, more importantly for our main purpose here, how different doctrinal choices can affect judgments about the legality and legitimacy of governmental actions. As explained in the following sections of this Part, we find confirmatory evidence of the subtlety of the difference between *overseeing* and *deciding*. That is, while many of our respondents seem to be able to track this difference, nontrivial portions respond in ways contrary to expectations. More to the point, though, we find evidence supporting skepticism of the benefits of the overseer-decider standard, as respondents appear, irrespective of legal norms, more likely to blame Presidents when they get more involved and outcomes eventually turn out badly than they are to give Presidents credit for getting more involved when outcomes turn out well. That is, the political risks to the President

[49] All respondents were recruited on Amazon Mechanical Turk (MTurk) and were paid either $0.75 or $1.00 each to fill out an online survey. On the recruitment and consent page of the survey, respondents were told they would be "answering questions about government decision-making." The use of MTurk is generally well-accepted among both social scientists and legal scholars engaged in empirical research. *See* Joseph K. Goodman et al., *Data Collection in a Flat World: The Strengths and Weaknesses of Mechanical Turk Samples*, 26 J. BEHAV. DECISION MAKING 213, 222 (2013) ("[W]e highly recommend MTurk to behavioral decision-making researchers."); Adam J. Berinsky et al., *Evaluating Online Labor Markets for Experimental Research: Amazon.com's Mechanical Turk*, 20 POL. ANALYSIS 351 (2012) (evaluating the benefits and trade-offs of MTurk and generally recommending it as a valuable research tool); David Hauser & Norbert Schwarz, *Attentive Turkers: MTurk Participants Perform Better on Online Attention Checks than Subject Pool Participants*, BEH. RES. METHODS, Mar. 2015, at 1 (concluding that MTurk participants are more attentive to instructions than traditional subjects).

who gets involved already seem to provide a palpable constraint on presidential involvement. Most significantly, the results that speak most directly to our principal hypothesis about the effects of legal norms on perceptions of legitimacy reveal that respondents tend to view judicial decisions made under the overseer-decider standard as less legitimate than those made under a formal rule, even controlling for respondents' substantive views about the merits of the case.

A. Decisionmaking Study

Our first study examined differences in presidential action level and considered who respondents perceive to be the decisionmaker in a scenario about redesigning security features on the $50 bill.[50]

1. Methods. We surveyed 591 respondents on MTurk who were randomly assigned to one of four conditions: *neutral*, *ask*, *command*, or *sign*.[51] These conditions were intended to increase progressively the amount of involvement that the President had in the decision to move forward with the redesign.

All of the participants were presented with the following scenario:

> *Please assume the following.*
>
> *The Federal Bureau of Engraving and Printing ("Bureau") carries out the design and printing of U.S. paper currency. The Bureau recently redesigned the $100 bill to incorporate new security features and these bills are currently in circulation. The question now is whether to update the security features in the $50 bill.*
>
> *Even though it made sense to redesign the $100 bill, there are both pros and cons to the redesign of the $50 bill. In a meeting at the White House, Bureau staff members brief the Treasury Secretary and the President of the United States on the pros and cons. At the conclusion of the meeting, the President thanks the staff for an informative presentation.*

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[50] For all of our studies, we purposefully tried to choose an issue where individuals would not already have strongly held political beliefs.

[51] Respondents were paid one dollar each to participate. We began with an MTurk "HIT" requesting 600 participants. In Qualtrics, our survey software, we received 603 fully completed surveys and 7 partially completed surveys. We removed the data for completed surveys that did not match an MTurk HIT ID, partially completed surveys, and completed surveys that had an ID or IP address that matched a partially completed survey (to avoid having data from participants who had potentially seen two versions of the study), which resulted in our final count of 591 participants. All participant data removals were chosen based only on this information and completed before and independent of any data analysis. We followed this process for each of the studies in this paper. The respondents in this first study were 50.4% female and the median age was 34 (range 18 to 77). Respondents reported that they were 45.2% Democrat, 17.3% Republican, 32.0% Independent, and 3.9% Other; 1.7% selected the option, "Prefer not to say."

The Bureau is situated within the U.S. Department of the Treasury. Congress has given the Secretary of the Treasury the authority to make all decisions related to security features on currency. The Bureau will only begin work on a new design of the $50 bill if it receives proper written authorization.

Immediately following this text was a sentence indicating the presidential action (or inaction) that varied by condition. Respondents in the *neutral* condition had no additional action by the President and saw the following sentence:

After the meeting, the Treasury Secretary signs a document directing the Bureau to redesign the $50 bill.

Respondents in the *ask* condition saw:

After the meeting, the President asks the Treasury Secretary to move forward with the plans to start the redesign. The Treasury Secretary signs a document directing the Bureau to redesign the $50 bill.

Respondents in the *command* condition saw:

After the meeting, the President commands the Treasury Secretary to move forward with the plans to start the redesign. The Treasury Secretary signs a document directing the Bureau to redesign the $50 bill.

Finally, respondents in the *sign* condition saw:

After the meeting, the President signs a document directing the Bureau to redesign the $50 bill.

After they were presented with the full scenario, respondents were first asked, "Should the Bureau now begin work on the redesign of the $50 bill?" in an effort intended to assess whether they thought proper authorization had indeed been granted. On the next page the scenario information continued with, "Assume that immediately after the document is signed the Bureau starts working on the redesign." Respondents were then asked, "Who decided that the redesign work should begin?"

After answering these questions that formed our main dependent variables, respondents answered a series of other questions assessing the scenario, presidential actions in general, and the legitimacy of the legal system in the U.S., before answering a few demographic questions.

2. Results. Respondents answered the first question, about whether the Bureau "should" begin work, on a 7-point scale ranging from "Definitely Not" (coded as 1) to "Definitely Yes" (coded as 7). Table 1 contains the summary of the results.

Table 1
Decisionmaking Study – Should Bureau Proceed – Ranges and Averages

Condition	Min	Max	Median	Mean
neutral (n=151)	1	7	6	5.92
ask (n=148)	1	7	6	5.98
command (n=152)	2	7	6	5.93
sign (n=140)	1	7	6*	5.46**
all conditions (n=591)	1	7	6	5.83

* p<.05, ** p<.01, ***p<.001 – comparisons are between (request, order, or sign) condition with neutral condition. Differences on means are from Welch Two Sample t-test. Differences on medians are results of Wilcoxon rank sum test.

For the most part, respondents clearly thought the Bureau should begin work on the redesign. Although still concentrated on the "should" side of the scale, there were slight but significant differences observed only between the *sign* condition and the other conditions. When the President signed the authorization document instead of the Treasury Secretary, participants were significantly less sure that the Bureau should proceed compared to the *neutral* condition,[52] the *ask* condition,[53] and the *command* condition.[54]

Our primary dependent variable of interest was the question, presented after the scenario continued with plans having proceeded, of who made the decision that the redesign work should begin. Respondents were presented with four possible options: *President*, *Treasury Secretary*, *Bureau Director*, and *Congress*.[55] The answers given by respondents for each question are shown in Table 2.

Table 2
Decisionmaking Study – Decider Percentages

Condition:	neutral (n=151)	ask (n=148)	command (n=152)	sign (n=140)	all conditions (n=591)
President	8%	39%	51%	63%	40%
Treasury Secretary	68%	45%	33%	19%	42%
Bureau Director	17%	11%	15%	13%	14%
Congress	7%	5%	1%	6%	5%

Percentages of responses for each answer to the question about "who decided."

[52] t=2.73, df=257.80, p=0.007
[53] t=3.04, df=262.45, p=0.003
[54] t=2.73, df=264.21, p=0.007
[55] Answer choices were presented in randomized order.

Since we are primarily concerned here with whether the President is perceived as the decision maker, we focus on whether the President was chosen as the decider (coded as 1) or not (coded as 0) for the following analysis. Table 3 contains a summary of these results.

Table 3
Decisionmaking Study – President Chosen as Decider

	Median	Mean
neutral (n=151)	0	0.08
ask (n=148)	0***	0.39***
command (n=152)	1***	0.51***
sign (n=140)	1***	0.63***
all conditions (n=591)	1	0.40

* p<.05, ** p<.01, ***p<.001 – comparisons are between (request, order, or sign) condition with neutral condition. Differences on means are from Welch Two Sample t-test. Differences on medians are results of Wilcoxon rank sum test.

For this measure there were significant differences in the expected direction across all two-way comparisons. The *neutral* group was significantly less than *ask*,[56] *command*,[57] and *sign*.[58] *Ask* was less than *command*[59] and *sign*.[60] Finally, *command* was also less than *sign*.[61]

To analyze these differences further, we performed regression analyses. The results of these analyses, which included controls for demographics like age and gender, as well as for self-reported political and policy ideologies, are reported in Table 4.

[56] t=6.67, df=228.92, p<.001
[57] t=9.23, df=232.75, p<.001
[58] t=11.79, df=214.67, p<.001
[59] t=2.12, df=298.00, p=0.034
[60] t=4.24, df=285.32, p<.001
[61] t=2.11, df=289.31, p=0.036

Table 4
Decisionmaking Study – President Chosen as Decider – Regressions

Type:	OLS	OLS	Logit	Logit
	By Condition (1)	With Political Views (2)	By Condition (3)	With Political Views (4)
Intercept	0.07 (0.04)	0.04 (0.16)	-2.48*** (0.32)	-2.75** (0.89)
Condition: Ask	0.31*** (0.05)	0.31*** (0.05)	2*** (0.35)	2.03*** (0.35)
Condition: Command	0.43*** (0.05)	0.42*** (0.05)	2.48*** (0.34)	2.49*** (0.35)
Condition: Sign	0.55*** (0.05)	0.55*** (0.05)	2.98*** (0.35)	3.02*** (0.35)
Party/Policy		Included		Included
Age/Gender	Included	Included	Included	Included

n=588. *p<.05, **p<.01, ***p<.001 The dependent variable is a coding of whether respondents chose "President" when asked "who decided". A choice of President is coded as 1; a choice of anybody else is coded as 0. Independent variable values that are not categorical were scaled by subtracting the mean and dividing by the standard deviation.

After the main dependent variables, we asked the respondents to choose whether they thought the President was closer to "overseeing" or closer to "deciding" in the scenario. This was presented as a 7-point scale with only the end-points "Overseeing" (coded as 1) and "Deciding" (coded as 7) being labeled.

Table 5
Decisionmaking Study – Overseeing/Deciding Scale – Ranges and Averages

Condition	Min	Max	Median	Mean
neutral (n=151)	1	7	2	2.87
ask (n=148)	1	7	5***	4.74***
command (n=152)	1	7	5***	4.90***
sign (n=140)	1	7	6***	5.02***
all conditions (n=591)	1	7	5	4.37

* p<.05, ** p<.01, ***p<.001 – comparisons are between (request, order, or sign) condition with neutral condition. Differences on means are from Welch Two Sample t-test. Differences on medians are results of Wilcoxon rank sum test.

Respondents in the *neutral* condition were more likely to say that the President was closer to "overseeing" and respondents in the three other conditions were more likely to say that the President was closer to "deciding". This was significant when comparing the neutral condition with all three of the other actions, including *ask*,[62] *order*,[63] and *sign*.[64] No significant differences were observed between these three types of presidential action.

Respondents were less certain that the Bureau should proceed when the President was the one who signed the document instead of the Treasury Secretary (regardless of whether the Treasury Secretary signed immediately, or whether the President asked or commanded the Treasury Secretary to move forward). The President was seen as being closer to "deciding" than overseeing when the President performed an additional action, whether asking or commanding the Treasury Secretary to move forward, or even signing directly. In the end, when respondents were asked to determine who the "decider" was among all of the actors mentioned in the scenario, the President was significantly more likely to be considered the decider between all conditions, with no additional action being the least likely, followed by asking the Treasury Secretary to move forward, then followed by commanding the Treasury Secretary to move forward, and finally by signing the document.

B. Responsibility Study

Our second study examined differences in presidential action level and how those differences might affect who respondents perceive as deserving of credit or blame in the same scenario as in the Decisionmaking Study.

1. Methods. The introductory scenario for this study was identical to the previous study, centering on a redesign of the $50 bill.[65] Respondents were again randomly assigned to one of the four conditions: *neutral*, *ask*, *command*, or *sign*.[66] As with the Decisionmaking Study, these conditions progressively increased the level of presidential involvement in the process to move forward with the currency redesign.

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[62] $t=8.35$, $df=288.86$, $p<.001$

[63] $t=9.46$, $df=298.87$, $p<.001$

[64] $t=9.79$, $df=281.11$, $p<.001$

[65] See *supra* Part II.A.1.

[66] We surveyed 800 respondents on MTurk who were each paid one dollar each to participate. The respondents were 45.9% female and the median age was 31 (range 18 to 73). Respondents were 44.1% Democrat, 17.8% Republican, 31.2% Independent, and 3.8% Other; the remaining 3.1% selected "Prefer not to say."

After the main scenario, respondents read the following additional paragraph indicating that the redesign had taken place, and then they were asked who deserved the credit (if the result was positive) or blame (if the result was negative) for the redesign:

> *Assume that immediately after the document is signed the Bureau starts working on the redesign. Upon completion, the redesigned $50 bill is released into general circulation. Banking and local law enforcement professionals are [happy / unhappy] with the additional security features. Who deserves [credit / blame] for this?*

Respondents were each presented with the same four possible options of President, Treasury Secretary, Bureau Director, and Congress. This time, they were provided with sliders on a 100-point scale and had to move the sliders to distribute 100% of the responsibility among the four choices.

2. Results. A summary of the average credit or blame assigned to each choice by respondents is displayed in Table 6.

Table 6
Responsibility Study – Credit or Blame Percentages

Condition:	neutral (n=201)	ask (n=199)	command (n=202)	sign (n=198)	all conditions (n=800)
Credit					
President	10.1%	26.5%	23.7%	21.8%	20.5%
Treasury Secretary	41.3%	30.6%	27.5%	32.7%	33.0%
Bureau Director	35.1%	30.8%	35.4%	34.6%	34.0%
Congress	13.5%	12.1%	13.4%	10.9%	12.5%
Blame					
President	8.2%	27.4%	33.9%	22.1%	22.9%
Treasury Secretary	44.5%	32.0%	31.2%	35.1%	35.8%
Bureau Director	32.0%	27.1%	21.4%	29.2%	27.4%
Congress	15.2%	13.6%	13.5%	13.6%	14.0%

Mean level chosen by respondents when asked who deserved credit or blame.

As an initial analysis, looking only the level of responsibility assigned to the President (whether it was blame or credit), we mostly duplicated the decider results from the Decisionmaking Study. The credit or blame allocated to the President under the *neutral* condition was significantly less than in the *ask*,[67] *command*,[68] and *sign* conditions.[69] *Ask* was less than *sign*[70] and *command* was less than *sign*.[71] The only comparison where significant differences were not observed was that between *ask* and *command*.[72]

We performed regression analyses to control for demographics and self-reported policy ideologies. To disentangle differences based on whether the question was phrased as credit or blame, we provide full data models that include the question type as an independent variable, as well as partial results for each of the credit and blame versions individually. These results are reported in Table 7.

Table 7
Responsibility Study – Amount of Credit or Blame – Regressions

	Credit or Blame (1)	Credit or Blame (2)	Credit Only (3)	Blame Only (4)
Intercept	7.4*** (1.7)	12.1** (4.1)	23.3*** (5.4)	6.4 (5.9)
Phrased as Blame	2.4 (1.3)	2.4 (1.4)		
Condition: Ask	17.8*** (1.9)	17.6*** (1.9)	16*** (2.4)	19.3*** (2.9)
Condition: Command	19.7*** (1.9)	19.6*** (1.9)	13.9*** (2.4)	25.3*** (2.9)
Condition: Sign	12.9*** (1.9)	12.8*** (1.9)	11.4*** (2.4)	14*** (2.9)
Party/Policy		Included	Included	Included
Age/Gender	Included	Included	Included	Included

n=794. *p<.05, **p<.01, ***p<.001 The dependent variable is the amount of responsibility (either blame or credit, depending on the question) assigned to the President on a 100-point scale. Independent variable values that are not categorical were scaled by subtracting the mean and dividing by the standard deviation.

---

[67] t=10.73, df=291.1, p=<.001
[68] t=10.7, df=276.1, p<.001
[69] t=8.77, df=319.3, p<.001
[70] t=2.56, df=385.1, p=0.011
[71] t=3.27, df=370.6, p=0.001
[72] t=0.84, df=393.6, p=0.403

Regardless of how the responsibility question was phrased, the level of presidential action appeared to affect significantly the amount of credit or blame assigned to the President. We looked further at differences between credit and blame by condition, and a difference emerged in the *command* condition. When the President commanded that action be taken, the mean credit assigned to the President was 23.7% when things turned out well, while the blame assigned to the President was 33.9% when things did not go well -- a difference that was significant.[73] This was also true in the "overseeing" versus "deciding" scale, where the mean result for credit was 3.9 (just below the halfway point), and the mean result for blame was closer to "decider" at 5.1, again a statistically significant difference.[74]

In summary, although the BIII. Responsibility Study showed similar results when looking at the same variations in levels of presidential involvement as in the Decisionmaking Study, it revealed differences in how the President reaped credit and blame when commanding policy outcomes. Both the blame and credit groups saw that the President commanded the Treasury Secretary to move forward, but respondents who read about the decision going poorly were more willing to assign blame to the President and more likely to say that the President was "deciding" in the scenario.

C. Disagreement Study

Our third study examined how differences in viewpoints between the President and Treasury Secretary affected respondents' perception of who was the "decider." Again, we used the same scenario as in the Decisionmaking Study about redesigning the security features on the $50 bill.

[73] $t=3.12$, $df=181.8$, $p=0.002$

[74] $t=4.11$, $df=198.2$, $p<.001$

1. Methods. Respondents were randomly assigned to one of four conditions: *agree-secretary-signs*, *disagree-secretary-signs*, *agree-president-signs,* or *disagree-president-signs*.[75] These conditions varied the agreement between the President and Treasury Secretary over whether to move forward with a currency redesign, and they varied who expressed a preference versus who signed a document directing the redesign. The scenario text was the same as in Part II.A.1. Respondents in the conditions where the Treasury Secretary signed the document were presented with the following:

> *After the meeting, the President expresses a preference to the Treasury Secretary that plans [should / should not] move forward to start the redesign. The Treasury Secretary [agrees / disagrees] and signs a document directing the Bureau to redesign the $50 bill.*

Respondents in the conditions where the President signed the document saw this version:

> *After the meeting, the Treasury Secretary expresses a preference to the President that plans [should / should not] move forward to start the redesign. The President [agrees / disagrees] and signs a document directing the Bureau to redesign the $50 bill.*

All respondents then saw the same questions as indicated in the Decisionmaking Study, beginning with whether the Bureau should proceed with the redesign, and then being asked who the "decider" was.

2. Results. Respondents answered the first question – about whether the Bureau should commence work – based on a 7-point scale ranging from "Definitely Not" (coded as 1) to "Definitely Yes" (coded as 7). Table 8 contains the summary of the results.

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[75] We surveyed 589 respondents on MTurk who were each paid one dollar to participate. The respondents were 45.5% female and the median age was 31 (range 18 to 78). Respondents were 45.3% Democrat, 15.1% Republican, 33.4% Independent, and 3.6% Other; the remaining 2.5% chose "Prefer not to say."

Table 8
Disagreement Study – Should Bureau Proceed – Ranges and Averages

Condition	Min	Max	Median	Mean
Secretary Signs				
agree (n=147)	1	7	6	5.95
disagree (n=152)	1	6	6	4.99
President Signs				
agree (n=145)	2	7	6	5.84
disagree (n=145)	1	6	5	4.83
all conditions (n=589)	1	7	6	5.40

Respondents still thought the Bureau should begin work on the redesign, but there were significant differences in how close they were to "Definitely Yes," depending on which condition they were presented with (either disagreeing or agreeing). Respondents were less sure that the Bureau should move forward when the Treasury Secretary signed the authorization document after the President expressed a preference for not moving forward; this difference was significant.[76] Similarly, respondents were significantly less sure that the Bureau should move forward when the President signed the authorization document after the Treasury Secretary expressed a preference for not moving forward.[77] There were no observed differences based on who signed when there was agreement in both conditions,[78] or when there was disagreement in both conditions.[79]

Similar to the Decisionmaking Study, we presented the next question after the scenario, asking who made the decision that the redesign work should begin. Respondents were presented with the same four possible options: President, Treasury Secretary, Bureau Director, and Congress.[80] The answers given for each question are provided in Table 9.

[76] t=5.35, df=279.1, p=<.001
[77] t=5.47, df=259.5, p=<.001
[78] t=0.69, df=290, p=0.493
[79] t=0.8, df=292.7, p=0.424
[80] Answer choices were presented in randomized order.

Table 9
Disagreement Study – Decider Percentages

Condition:	Secretary Signs agree (n=147)	Secretary Signs disagree (n=152)	President Signs agree (n=145)	President Signs disagree (n=145)	all conditions (n=589)
President	38%	3%	46%	76%	40%
Treasury Secretary	44%	77%	35%	15%	43%
Bureau Director	14%	14%	17%	6%	13%
Congress	4%	6%	3%	3%	4%

Percentages of responses for each answer to the question about "who decided."

Again, we focus our attention on whether the President was chosen as the decider (coded as 1) or not (coded as 0). Table 10 contains a summary of these results.

Table 10
Disagreement Study – President Chosen as Decider

	Median	Mean
Secretary Signs		
agree (n=147)	0	0.38
disagree (n=152)	0	0.03
President Signs		
agree (n=145)	0	0.46
disagree (n=145)	1	0.76
all conditions (n=589)	0	0.40

For this measure, the presence of disagreement was associated with significant differences in whether the President was chosen as the decider. When they disagreed, the President was significantly more likely to be chosen as the decider when the President signed compared to when the Treasury Secretary signed.[81] Also, when the same individual signed, significant differences appeared in judgments about the decider based on whether they were in agreement. When the Treasury Secretary signed, the President was significantly less likely to be thought of as the decider if the President had expressed a preference for not moving forward.[82] When the President signed, the President was significantly more likely to be viewed as the decider if the Treasury Secretary had expressed a preference for not moving forward.[83] However, notably, when the President and Treasury Secretary were in

[81] $t=19.29$, $df=181.9$, $p<.001$
[82] $t=8.39$, $df=176.4$, $p=<.001$
[83] $t=5.55$, $df=281.6$, $p<.001$

agreement, there was no observed difference in whether the President was chosen based on who signed.[84]

Table 11
Disagreement Study – President Chosen as Decider – Regressions

Type:	OLS	OLS	Logit	Logit
	By Condition (1)	With Political Views (2)	By Condition (3)	With Political Views (4)
Intercept	0.2*** (0)	0 (0.1)	-1.6*** (0.2)	-2.3*** (0.7)
President Signed	0.4*** (0)	0.4*** (0)	1.8*** (0.2)	1.8*** (0.2)
Pres & Sec Agreement	0.0 (0)	0.0 (0)	0.1 (0.2)	0.2 (0.2)
Party/Policy		Included		Included
Age/Gender	Included	Included	Included	Included

n=585. *p<.05, **p<.01, ***p<.001 The dependent variable is a coding of whether respondents chose "President" when asked "who decided". A choice of President is coded as 1; a choice of anybody else is coded as 0. Independent variable values that are not categorical were scaled by subtracting the mean and dividing by the standard deviation.

To analyze these differences further, we performed regression analyses controlling for demographics and political ideologies and separating out the variations in the two conditions, of who signed and of agreement. Regression results are reported in Table 11, *supra*.

After the main dependent variables, we asked the respondents to choose whether they thought the President was closer to "overseeing" or closer to "deciding" in the scenario. This was presented as a 7-point scale with only the end-points "Overseeing" (coded as 1) and "Deciding" (coded as 7) being labeled.

[84] t=1.28, df=289.6, p=0.2

Table 12
Disagreement Study – Overseeing/Deciding Scale – Ranges and Averages

Condition	Min	Max	Median	Mean
Secretary Signs				
agree (n=147)	1	7	2	4.44
disagree (n=152)	1	7	2	2.85
President Signs				
agree (n=145)	1	7	4	4.16
disagree (n=145)	1	7	6	5.64
all conditions (n=589)	1	7	5	4.26

These results matched very closely with the decider results in this study. When the President and Treasury Secretary disagreed, and the President signed the authorizing document, respondents were significantly more likely to say the President was "deciding" compared to when the Treasury Secretary signed.[85] When the President and Treasury Secretary were in agreement, there was no difference observed.[86] When the Treasury Secretary signed, the President was closer to "overseeing" if the President had expressed a preference for not moving forward.[87] When the President signed, the President was closer to "deciding" if the Treasury Secretary had expressed a preference for not moving forward.[88]

In summary, respondents were less certain that the Bureau should proceed when the President and the Treasury Secretary disagreed about whether to move forward (regardless of who signed). The President was seen as being closer to "deciding" than overseeing when the President signed or the parties disagreed about moving forward. The President was seen as being closer to "overseeing" when they disagreed and the Treasury Secretary signed. Finally, when determining who the "decider" was among all of the actors mentioned in the scenario, the President was more likely to be considered the decider when the President signed or if the parties were in disagreement.

D. Legal Norm Study

The fourth study used a new scenario to examine how differences in the type of legal norm that a court is expected to apply in a lawsuit may affect the legitimacy of a court's decision regarding the legality of a President's action. This scenario also

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[85] t=13.9, df=293.3, p<.001
[86] t=1.22, df=288.7, p=0.225
[87] t=7.61, df=291.6, p<.001
[88] t=6.72, df=283.4, p<.001

used the Treasury Secretary and President as protagonists, but this time the scenario centered on amendments to credit card security regulations.

1. Methods. Respondents were randomly assigned to one of three norm conditions: *formal*, *reasonable*, or *decision*.[89] These conditions varied whether the norm was a bright-line rule or a standard, using either reasonableness language or overseer-decider language.

All of the participants were presented with the following scenario:

> *Please assume the following.*
>
> *Congress has given the Secretary of Treasury the authority to make all decisions related to security features on credit cards. That includes the authority to create and amend credit card security regulations, as well as to respond to petitions about these regulations, whenever and however the Secretary decides.*
>
> *Some years ago, the Treasury Department used the authority Congress gave the Secretary to create a regulation that required many businesses to install a new anti-fraud security technology. The regulation allowed businesses a limited time period within which to come into compliance.*
>
> *As the regulation's deadline approached, it became clear that most businesses would not have completed the required installations in time. Several business groups jointly filed a petition asking the Treasury Secretary to amend the regulation to extend the deadline.*
>
> *The Treasury Secretary wanted to keep the regulation unchanged. However, hearing the concerns raised by business groups and concluding that the impending deadline would pose potentially serious economic repercussions, the President of the United States commanded the Treasury Secretary to grant the petition and amend the regulation to extend the deadline.*
>
> *The Treasury Department then used normal procedures to grant the petition and amend the regulation, issuing a deadline extension.*
>
> *The amended regulation was then challenged in a lawsuit in federal court. The challengers' lawyers argued that the President illegally pressured the Treasury Secretary to relax the deadline. They pointed out that Congress had given regulatory authority to the Treasury Secretary and not to the President.*

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[89] We surveyed 298 respondents on MTurk who were paid seventy-five cents to participate. The respondents were 49.0% female and the median age was 33, with a range 18 to 77. Respondents were 39.9% Democrat, 19.5% Republican, 36.6% Independent, and 2.3% Other; the remaining 1.7% selected an option, "Prefer not to say."

In response, government lawyers pointed out that a Treasury Secretary is appointed by the President, who can remove a Secretary from office at any time.

In similar lawsuits in the past involving other government departments, courts have applied a rule derived from the U.S. Constitution that says [NORM]. This is the law the judge must apply to the dispute over the Treasury Department's deadline extension.

The "[NORM]" in the last paragraph varied by condition. Respondents in the *formal* condition saw the following:

Presidents are allowed to influence department heads like the Treasury Secretary, as long as departmental regulations (including amendments) are officially signed and approved by the department head and not the President.

Respondents in the *reasonable* condition saw:

Presidents are allowed to influence department heads like the Treasury Secretary, as long as they only do so in "reasonable" ways.

Respondents in the *decision* condition saw the overseer-decider standard:

Presidents are allowed to influence department heads like the Treasury Secretary, but not to make decisions for them.

Respondents were first asked to evaluate their own opinion on the legality of the President's actions. They were asked, "Based on your reading of this scenario and on the law that the judge must apply, do you t hink the President acted legally or illegally?" After choosing either "Illegally" (coded as 0) or "Legally" (coded as 1), they were asked "How confident do you feel about your answer above?" based on a five-point scale ranging from "Not Confident" (coded as 1) to "Very Strongly Confident" (coded at 5).

On the next page of the survey, respondents were reminded of the norm and further instructed, "Please now assume further that the judge decided the President did act legally." Then they were asked to evaluate the decision by choosing agreement on a seven-point scale with the following statements:

- The judge's decision is legitimate.
- The judge made the decision fairly on the basis of the facts and the law.
- Political ideology or bias likely entered into the judge's decision.

2. Results. Respondents' answers to the question about the legality are summarized in Table 13.

Table 13
Legal Norm Study – President Acted Legally – Means

Condition:	legal mean	confident mean	confident when legal=0	confident when legal=1
formal rule	0.8	3.2	2.9	3.3
reasonable standard	0.7	2.9	2.7	3.0
decision standard	0.6	3.0	2.9	3.1
all conditions	0.7	3.1	2.8	3.1

Performing two-way comparisons between the norms and answers to legality, there is only one significant difference in that respondents are more likely to say the President's action was legal when the norm type was *formal* than when the norm type was *decision* (i.e., overseer-decider).[90] These results are duplicated in regressions in Table 14.

Table 14
Legal Norm Study – President Acted Legally – Regressions

Type:	OLS	OLS	Logit	Logit
	By Norm type (1)	With Political Views (2)	By Norm Type (3)	With Political Views (4)
Intercept	0.7*** (0.1)	0.7** (0.2)	1.1*** (0.3)	0.9 (1)
Norm type: Reasonable	-0.1 (0.1)	-0.1 (0.1)	-0.4 (0.3)	-0.4 (0.3)
Norm type: Decision	-0.2* (0.1)	-0.2** (0.1)	-0.8* (0.3)	-0.9** (0.3)
Party/Policy		Included		Included
Age/Gender	Included	Included	Included	Included

n=296. *p<.05, **p<.01, ***p<.001 The dependent variable is the answer to the question of whether the participant thinks the President acted legally (coded as 1) or illegally (coded as 0). Independent variable values that are not categorical were scaled by subtracting the mean and dividing by the standard deviation.

[90] t=2.68, df=190.4, p=0.008

Respondents' perceptions of the judge's decision were combined to form a total judge legitimacy score up to 21 points, where a higher number indicates a greater level of agreement with the legitimacy and fairness statements, and a greater level of disagreement with the bias statement. A summary of the individual answers and total score is in Table 15.

Table 15
Legal Norm Study – Judge Evaluation – Means

	agree with legitimate	agree with fairly	disagree with bias	total
formal rule	5.7	5.7	4.5	16
reasonable standard	5.1	5.3	4.2	14.5
decision standard	5.0	4.8	3.9	13.7
all conditions	5.3	5.3	4.2	14.7

Means of answers scored on a s even-point scale from "Strongly Disagree" (1) to "Strongly Agree" (7). The political bias question is reverse coded so that all numbers presented here are in the form that a higher number means more trust in the judge's decision.

Considering two-way comparisons, the average evaluation of the judge's legitimacy is significantly higher when the norm type is *formal* rather than *reasonable*[91] or *decision*.[92] The two standard types – *reasonable* and *decision* – do not show any observable, statistically significant differences.[93] However, these comparisons do not take into account the differences in respondents' perceived legality of the President's actions. Table 16 contains regressions which control for demographics as w ell as included variables for whether respondents thought the President acted legally and how confident they were in their conclusions. Even though perceived legality accounts for some of the differences between conditions, there are still additional differences that are being observed when controlling for this perceived legality.

[91] t=2.88, df=193.4, p=0.004
[92] t=4.58, df=191.9, p<.001
[93] t=1.66, df=195.8, p=0.099

Table 16
Legal Norm Study – Judge Evaluation – Regressions

	By Norm type (1)	By Legal Choice (2)	By Both (3)	With Party/Views (4)
Intercept	15.8*** (0.4)	12*** (0.4)	13.1*** (0.5)	12.5*** (1.5)
Norm type: Reasonable	-1.4** (0.5)		-1.0* (0.5)	-1.0* (0.5)
Norm type: Decision	-2.3*** (0.5)		-1.6*** (0.5)	-1.6** (0.5)
Legal		3.6*** (0.4)	3.4*** (0.4)	3.4*** (0.4)
Confident		0.3 (0.2)	0.3 (0.2)	0.3 (0.2)
Party/Policy				Included
Age/Gender	Included	Included	Included	Included

n=296. *p<.05, **p<.01, ***p<.001 The dependent variable is the total judge score, which combines three 7-point questions. The higher the score the more trustworthy the judge's decision. Independent variable values that are not categorical were scaled by subtracting the mean and dividing by the standard deviation.

In summary, respondents were more likely to view the President as acting legally when the norm is formal than when it is the overseer-decider standard. Yet, when a judge decided the President acted legally, respondents were more likely to view the judge's decision as legitimate, fair, and unbiased when the norm was formal than when it was either of the two standards. This difference held even controlling for the perceived legality of the President's actions.

E. Synopsis: Contributions and Robustness

These experimental studies provide new insights into how laypeople assess executive and judicial actors in the context of separation of powers--issues that have been unexplored empirically until now. Our studies provide important insight into when individuals may be more or less ready to assign responsibility, whether based on actual actions of the president and agency actors, or based on messages which are carefully crafted by the White House, agencies, and the media. We have shown that individuals are sensitive both to the level of presidential involvement in administrative decisionmaking as well as to the nature of the legal norms that they are told prevail about this involvement.

In addition to our findings about the effect of norm type on assessments of legitimacy, we have shown that individuals are sensitive to the level of presidential involvement in an administrative decision. When merely being briefed on the issues, the President is not perceived to be the "decider" of the outcome, compared to when the President takes an explicit action, like asking or commanding a department head; however, in any of these cases individuals still think that the President's direction should nonetheless be followed by the administrative agency. However, if the President explicitly bypasses the authority of the department head by directly signing the applicable legal documents, individuals begin to question whether the agency should proceed with the presidential direction.

Furthermore, individuals are discriminating when it comes to allocating credit and blame. They are generally more willing to assign blame to the President when there are poor outcomes than they would give him credit when things go well. We have also shown that individuals apportion decisionmaking responsibility differently based on whether the President and department head find themselves in agreement. When it is obvious that the executive branch is working in sync, formalities such as signing matter less, but if there is disagreement then individuals consider whose preference was carried out, regardless of the hierarchy of authority.

We do acknowledge, of course, that these findings from our vignette-based experimental research, like those from any such research, have their limitations. For one thing, vignettes are, by definition, artificial. Outside of the experimental setting of a survey, public impressions on issues like those we have measured would be formed after exposure to multiple sources of potentially conflicting information, where it would probably not be as easy to for members of the public to know exactly what had happened. However, using our simplified scenario with clear behavior allows us to capture how individuals are influenced by the factors we manipulated. This is a well-accepted research strategy used in other legal domains and suitable for delivering empirical insight under the constraints inherent in studying choices about legal doctrine.

We also acknowledge that, in their daily lives, members of the public are often exposed to highly politicized and salient issues of the kind covered in the media, while our four studies rely on fact patterns that deliberately avoided highly salient political issues. We made that decision self-consciously for appropriate research design reasons. Our principal aim has been to assess the effects of rules versus standards on public perceptions of the legitimacy of the law, not to capture the indisputably real effects that would accompany highly salient, politicized issues.[94]

[94] In a relevant paper, political scientists Andrew Reeves and Jon Rogowski provide evidence showing that individuals' partisanship does affect their judgments about the unilateral exercise of power by the President. However, they also find evidence that voters can and do "distinguish the *president* from the *presidency*." Andrew Reeves & Jon C. Rogowski, *Unilateral Powers, Public Opinion, and the Presidency*, 78 J. POL. 137, 137 (2016) (emphasis added). We are, in this

By choosing less-salient examples, we were able to isolate better respondents' perceptions of responsibility and legitimacy, rather than of partisanship. We also instructed respondents explicitly that the vignettes were "hypothetical." In these ways, our methodology allowed us to measure independently just the effects of our manipulations, such as of the level of presidential involvement or the nature of the applicable legal norm.

Other empirical research demonstrates that politicization of legal actors and institutions significantly weakens public legitimacy in these institutions.[95] At the same time that we excluded politically salient facts from our vignettes to isolate the effects of the conditions we manipulated, such as differences in legal norms, we were not able to study here the extent to which the presence of such politically salient facts might exacerbate the negative effects on legitimacy we did find. Not only would the presence of politicized elements in real-world disputes presumably have their own independent effects on l egitimacy, but we would hypothesize that politicization would interact with the overseer-decider standard to heighten the threats to legitimacy we observed. After all, it will always be easier for a fuzzy standard than a clear rule to become manipulated and deployed inconsistently as a rhetorical weapon in partisan argumentation. Investigating the extent of this possible interactive effect further will need to await future research.

We also conducted a series of robustness checks to ensure that our results were not affected by any possible bias in the party affiliations or political ideologies of the respondents. The source of our samples, MTurk, does yield respondents in levels disproportionate to population in terms of political party affiliation, which was the case for our samples. In the four studies we report here, we did not give any names or party identification to any of the protagonists in the vignettes. Of course, we still controlled in all cases for respondents' partisan affiliations and social and economic policy ideologies in our regression analyses. In addition to controlling for party affiliations and policy ideologies, we ran weighted versions of every t-test and OLS regression that was reported. Weighting adjusts for differences in sample size and is a well-accepted statistical approach used in circumstances similar to ours. Our multiple checks across all of our studies returned similar results, with only one exception in which a previously reported significant result became statistically insignificant.[96] These extensive robustness checks lend confidence to our results notwithstanding the sampling tendencies associated with our source of respondents.

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phraseology, much more interested in perceptions about the *presidency*—and ultimately in the law— than in judgments about any specific *President*. *Cf.* TYLER, *supra* note 38, at 27-30 (distinguishing support *for institutions* from support *for those who lead them*).

[95] *See, e.g.,* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE (2009).

[96] This difference was in the Decisionmaking Study, comparing whether the president was perceived as the decider between command and sign conditions. The reported t-test result was significant with a p-value of 0.036. *See supra* note 617. However, the weighted t-test result was

Finally, we strived to ensure that our results were not affected by the possibility, given that our vignettes did not name a specific President of the United States, that our respondents were simply assuming that the vignette described actions by the current President, Barack Obama. If this were the case, we could have expected that party affiliation would have influenced our results. But as we just noted, our results were affected neither by political ideology nor party affiliation. Nevertheless, we recognized the possibility that heightening the salience and reality of the vignette by naming a specific President could affect respondents' answers, especially since this possibility has been realized in other surveys.[97] Nevertheless, although some of our respondents in our four studies probably did assume the vignette was about President Obama, we believe that it was at most a very small minority who did so. We reach this judgment because we subsequently ran a separate study that included a replication of our Legal Norms study as well as a question to check for this possibility. After asking the other experimental questions, we asked our respondents which President had been referred to in the vignette (even though the vignette did not name any President). Only 14 percent of our respondents answered that they either presumed or remembered that it was the current president or mentioned President Obama by name.

Future work could undoubtedly build on the work we have presented here. Other research could pursue scenarios with different policy issues and other governmental departments or offices. Researchers could also build on our framework to seek to assess how respondents' attitudes might vary depending on the level of certainty about a President's involvement, perhaps by exposing them to multiple or conflicting sources of information. Clearly what we have started here

III. Implications for Executive Power Norms

Our results provide what we believe to be the first window into the ways that a broad cross-section of the public thinks about inter-branch interactions under different formulations of separation of powers norms. Although these results reveal points of convergence with expectations, they also reveal subtle differences in the doctrines, and they raise important questions about potential costs of subtle choices in the language of legal norms or the actions taken by presidents. In this Part, we discuss some of the implications of what can be learned from these studies for

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insignificant. (t=1.23, df=270.93, p=0.221). Considering just the group most underweighted originally, Republicans, the mean value of command (0.44) was still less than the mean value of sign (0.63). This difference was not statistically significant (t=-1.43, df=50.6, p=0.159), but that is possibly due to the small sample size of n=25 and n=30, respectively.

[97] Attaching President Obama's name to actions can lead to different results than a neutral action. *See, e.g.*, Roberta Rampton, *Most Americans Support Obama's Contested Immigration Plan: Poll*, REUTERS (Jan. 28, 2016), http://www.reuters.com/article/us-usa-election-immigration-idUSKCN0V617V?feedType=RSS&feedName=domesticNews.

understanding and assessing executive power norms. Overall, our findings raise new, important questions about the advisability of scholars, lawyers, and politicians continuing to invoke an overseer-decider standard as a purported constraint on presidential administration.

A. The Subtlety of Decisions and the Clarity of Bright-Line Rules

Our findings not only confirm the subtlety of the overseer-decider standard and its application with a large cross-section of the public, but they also suggest some additional potential limitations associated with the standard that might apply to those who inhabit the world of governmental agencies. We did find, as expected, that our respondents perceived the President to be more of a decider the greater the degree and formality of the President's involvement in the process. But this was merely the trend. Strikingly, more than 35 percent of the respondents in the Decisionmaking Study did not view the President as "the decider" even when the President signed a document giving formal authorization of the currency redesign. Those 35 percent, moreover, did not all coalesce around the same non-presidential actor as the decider. This is an interesting result that suggests an additional, unacknowledged conceptual challenge presented by the overseer-decider standard. The standard may be subtle not merely because it is difficult to draw the line between "oversight" and "decision"; it may be subtle and difficult to apply in circumstances involving collective decisionmaking-–precisely as exists in government.[98] When different individuals from multiple offices and across the legislative and executive branches are involved, is it ever possible to consider any single individual as "the decider"? Who really can be said to be "the" decider in a system of checks and balances?

The line-drawing that the overseer-decider standard demands became even more challenging when respondents were asked to make more fine-grained judgments. Once respondents are asked about the *degree of* deciding versus overseeing, there were no differences at all across the different levels of presidential involvement. That is, *Presidents were viewed as more of the decider once they get involved at all*-–regardless of what form their involvement took. Even if they are just asking and trying to influence-–that is, "overseeing"-–they are perceived by the public nevertheless to be more of the decider. The degree to which they are the decider does not change if they are *asking* or *commanding* their cabinet officials, or even if they actually take over the signing of authorizing documents, all other things being equal.

Of course, all other things are not always equal. The CIV. Disagreement Study shows that respondents' judgments about who was "the" decider, as well as about the degree of deciding versus overseeing, vary depending on whether Presidents and

[98] For a recent account emphasizing the multiplicity of decisionmaking actors in the administrative state, see Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1157-60 (2014).

their cabinet officials agree or disagree about a course of action. When Presidents and cabinet officials disagree, respondents are more likely to see whoever gets their way by signing the authorizing documents as being more of the decider. This is as would be expected. After all, when the Bush EPA denied California's waiver, critics drew significance from reports that EPA officials had been ready to grant the waiver request up until the time that Administrator Johnson had his meeting at the White House.[99] The existence of disagreement apparently makes respondents appear indifferent as to who signs the authorization document, notwithstanding the fact that they were told that "*Congress has given the Secretary of the Treasury the authority to make all decisions related to security features on currency*." In the Decisionmaking Study, respondents were less likely to report that the Bureau should proceed with the bill redesign when the President signed an authorization document versus the Secretary, but in the CIV. Disagreement Study that difference disappears and the disagreement seems to be all that matters.

B. Constraints on Presidential Involvement in Administration

Disagreement is also the condition under which the principal benefit of the overseer-decider standard is supposed to be realized. The standard does not matter when the President and administrator already agree. It is when they disagree that the existence of the overseer-decider standard is supposed to bolster the administrator's fortitude to resist obeying a President's command. As Professor Strauss puts it, "[d]istinguishing the legal from the political. . . reinforces the psychology of office."[100] The standard tells administrators that they are not legally obligated to substitute the President's judgment for their own. If the President persuades them of the wisdom of his position, that is one thing. But if administrators should remain unpersuaded, they have no legal duty to obey. It then becomes a matter of administrators and presidents making political risk management judgments. How likely is it that the president would really fire them or accept tendered letters of resignation? How much cost would the White House incur over a firing or resignation related to the disagreement?

These are indeed key questions. However, as one of us has explained elsewhere, they are questions that can arise regardless of whether the overseer-decider standard is accepted as a matter of constitutional law.[101] Since the standard only operates

[99] *See, e.g.*, *supra* text accompanying notes 39-43.

[100] Strauss, *supra* note 29, at 714.

[101] *See* Coglianese, *supra* note 29, at 19 (explaining that while "partisans tend to invoke constitutional concerns about presidential control of domestic policymaking using their own ideological lens . . . [t]he murkiness of the legal doctrine would keep the law from coming to the political appointee's aid in resisting an overbearing White House"); Coglianese, *supra* note 39, at 645 ("[T]he supposed constitutional rule limiting Presidents to mere oversight of agencies is incapable of neutrally circumscribing either presidential or administrative behavior").

within administrators' and Presidents' (and their staffs') minds—and not as something enforceable in a court—then one would expect these questions about resignation and replacement to dominate anyway. They are the only potential consequences confronting administrators and Presidents when they disagree; the purported standard of constitutional law is not only subtle, but provides no tangible incentives or effects to administrators or to the White House.

Perhaps if administrators could psychologically internalize the overseer-decider standard, the standard could help reinforce their backbones so that they make independent judgments about how to implement the statutes they are responsible for carrying out. If one imagines the kinds of people who head administrative agencies to be timid and meek, with very few strong opinions of their own, then perhaps the overseer-decider standard would be beneficial, even if it provides no judicially manageable standard.[102] Professor Strauss, at least, appears to hold that view, as he writes about the "tendencies both of some leaders to appoint yes-men, and of other appointees (those not meeting this description) to feel the impulses of political loyalty to a respected superior and of a wish for job continuity."[103] This is an empirical claim, but there is much in the political science literature that could reasonably lead one to question it. Rather than presidential appointees being proverbial "yes-men," the tendency appears to be the opposite. Appointees are accomplished leaders in their own right. They often have worked in a professional field related to the agency or otherwise have an interest in the agency's policy domain. Obviously they may well start out by sharing many of the same views as the President who appoints them, but when they disagree they presumably do so because of strongly held opinions or well-thought out professional judgments and it seems doubtful they would automatically fold were it not for the overseer-decider standard. It is commonly said that appointees have a tendency to "go native," coming to see the world from the perspective of their agency, rather than the White House, hence not automatically assuming the priorities and perspectives of the President. It was not for nothing that Richard Neustadt concluded that a President's most important power is the "power to persuade."[104]

Of course, the empirical tendencies of administrators to shrink in the face of presidential disagreement cannot be answered by our research. We did not study the behavior of elites who hold presidential appointments, and we also do not draw inferences about how presidential appointees behave under the different normative doctrines we studied. However, we note that no other systematic empirical evidence

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[102] The psychological internalization might be reinforced by the existence of informal, non-legal norms or conventions, even if not legal ones. *See, e.g.*, Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV., 1163, 1186 (2013).

[103] Strauss, *supra* note 29, at 714.

[104] RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN 11 (1980).

exists to show that the overseer-decider standard increases the optimal level of administrators' fortitude.

The appropriate empirical test, after all, would not be whether the overseer-decider standard is better than no norm at all. It would instead be whether such a standard leads to a more optimal amount of fortitude relative to the level induced by an alternative norm. We used one such alternative norm in our research: a bright-line rule that holds that any delegation of authority to an administrator means that the administrator's signature, and only the administrator's signature, can properly authorize action. Such a rule today appears to be widely honored, and occasions have arisen when White House officials have even been unable to get their way because administrative officials have refused to sign off, literally.[105] Importantly, such a bright-line rule is also judicially manageable. A court would surely be willing to entertain an ultra vires claim if the White House Chief of Staff—or even the President—instead of the EPA Administrator were to have signed a waiver for California to develop automobile emissions standards.

Our research offers relevant findings that further question the magnitude of any marginal effects the overseer-decider standard may provide. The BIII. Responsibility Study investigated how the public distributes credit and blame for administrative actions, and we found that members of the public are much more prone to blame the President when something goes wrong if the President "commands" rather than "asks." These findings suggest a political incentive that may already serve to keep Presidents from hewing in many instances to something like the overseer-decider line, even without any meaningful legal consequences associated with that line.[106] Any President concerned about public opinion appears to face intrinsic risks when getting more heavily involved in administrative actions should things turn out badly.[107] The BIII. Responsibility Study shows an asymmetry in how the public will blame a President when things go badly compared with the credit they will give the President when things go well. If these political risks already serve to constrain presidential overreach, any additional marginal benefit that might be added from a legal standard based on oversight versus deciding will likely be much smaller than commonly supposed, to the extent such a benefit really exists at all.

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[105] For a dramatic account of one such occasion involving former Attorney General Ashcroft, see Coglianese, *supra* note 29, at 20.

[106] For analyses supporting a similar position, see ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 75-81 (2010); Eric Posner, Presidential Leadership and the Separation of Powers (2015) (unpublished manuscript) (arguing that presidential power operates within important non-legal constraints), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2664409.

[107] In an era of frequent media leaks and extensive electronic trails, these risks cannot be dismissed out of hand simply due to the (relative) secrecy that ordinarily surrounds presidential deliberations.

C. Preserving Law's Legitimacy

Most strikingly, our research confirms our hypothesis that invoking the overseer-decider standard as a constitutional norm is not a costless exercise. The form that separation of powers doctrine takes appears to shape perceptions about fairness, bias, and legitimacy. In the DV. Legal Norm Study, both standards were negatively associated with respondents' judgments about the legitimacy of a judicial finding that the President acted legally.

We recognize, of course, that since the hypothetical court decision found the President had acted legally, it would be more likely under either the reasonableness standard or the overseer-decider standard for a respondent to question the court's legal judgment, as the two standards are, as a substantive matter, less advantageous to the President. The standards qualify, in some manner, the President's authority in a way that the formal rule does not. However, the regression results make clear that when we control for the substantive difference in the effect of the norm as reflected in respondents' own judgments of legality, they were still less likely to view the judge's decision as legitimate under either of the two standards than under the formal rule.

It is striking that we see a distinct and statistically significant diminution in public perceptions of the legitimacy of the legal system just by varying a single sentence describing how a norm about separation of powers might be expressed. Of course, perhaps for some judges and legal scholars these findings will merely confirm what they have already long intuited when deciding separation of powers disputes.[108] In articulating the political question doctrine, for example, the Supreme Court has emphasized caution about entering into disputes involving the powers of other branches of government, especially when the courts lack clear legal rules to apply.[109] Some widely noted separation-of-powers cases have been decided on the basis of bright-line rules,[110] and, over the years, judges and scholars have advocated more generally for taking more formalist approaches in separation of powers

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[108] In other contexts as well, empirical research shows that "rule-based decision-making" is generally positively associated with an increase in public perceptions of legitimacy in legal actors and institutions. *See, e.g.,* Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661 (2007) (summarizing results of a series of empirical studies on procedural justice).

[109] *See, e.g.*, Baker v. Carr, 369 U.S. 186, 210 (1962) ("We have said that '[i]n determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations.'") (citing Coleman v. Miller, 307 U.S. 433, 454-55 (1939)). For contemporary analysis of the political question doctrine, see Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1 (2013).

[110] *See, e.g.*, INS v. Chadha, 462 U.S. 919, 954-55 (1983) (finding unconstitutional statutory language authorizing a legislative veto because "Congress can implement [policy] in only one way: bicameral passage followed by presentment to the President").

cases.[111] With the addition of our research findings, judges and scholars now have some empirical evidence that, in addition to traditional legal and interpretive factors, reveal something else at stake in the debate over norms of executive power: public perceptions of the legitimacy of law.

Conclusion

When resolving inter-branch disputes, the constitution's text and history matter as do broader values such as democracy, individual liberty, and the rule of law. Yet as significant as the normative values underlying these questions are, values themselves only go so far. If administrative law generally, and separation of powers doctrine in particular, stands to reinforce or induce governmental behavior that is normatively defensible (or at least reduce governmental behavior that is normatively objectionable), then any analysis of doctrinal choices must also be informed by empirical analysis.

To inform efforts to move closer to a normative optimum, we need to understand better the empirical impact of administrative law. In the inter-branch context, law operates under much different institutional conditions. The branches being coordinate, legal doctrine is not applied by a judiciary in the same hierarchical fashion as it usually is. In addition, the behavioral import of legal doctrine in other settings presumably benefits from cooperation and mutual reinforcement by the legislative, executive, and judicial branches. Such cooperation obviously does not exist when inter-branch disputes arise. And of course, inter-branch disputes are by definition highly political. The executive and legislative branches, if not also the judiciary, hold extremely high institutional stakes in the outcome of these disputes. If law is little more than politics in disguise anywhere, it presumably would be in the realm of separation of powers.

Taking into account these challenging circumstances under which administrative law operates, it seems all the more important to understand how specific types of doctrinal formulations affect public perceptions of legitimacy. In the separation of powers context, to ask whether a particular doctrinal resolution is truly pro-executive or pro-legislative, or whether a formalistic or functionalist test better achieves a desired balance, is to ask an empirical question. Given how little we actually know about how doctrine and its different formulations affect governmental behavior and public perceptions, we offer this analysis as an advance in understanding how law

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[111] Formalism in the separation of powers context is often equated with an attempt to divide the federal government into three tidy branches, which, of course, other judges and scholars have rejected as unrealistic or simplistic. *See, e.g.*, M. Elizabeth Magill, *Beyond Power and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603 (2001); William N. Eskridge, *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL'Y 21 (1998); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions – A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

matters in the governmental process and showing what else is at stake in the debate over the legal norms that apply to questions about the President's role in the administrative state.

In addition to offering new insights about how members of the public perceive responsibility in the administrative state and how different legal norms affect views of legitimacy, we offer a path forward for additional research to assess how other administrative law doctrines may shape public perceptions of government and its legitimacy. When the House of Representatives sues the President, for example, any resulting court decision will not only have the potential to create a new equilibrium in the separation of powers game played by both ends of Pennsylvania Avenue; it also has the potential to affect, for good or ill, public perceptions of Congress, the Presidency, or both. Given that administrative law inherently aims to shape how government operates, further empirical research on the relationship between legal norms and public legitimacy should prove invaluable in an era of declining trust in governmental institutions and persistent concern about the law's legitimacy.[112]

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[112] *See, e.g.*, John R. Alford, *We're All in this Together: The Decline of Trust in Government, 1958-1996*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? (John Hibbing and Beth Theiss-Morse eds., 2001); JOSEPH S. NYE, JR., PHILIP D. ZELIKOW, AND DAVID C. KING, WHY PEOPLE DON'T TRUST GOVERNMENT 1-18 (1997) (providing an overview of why confidence in government has declined and offering possible explanations for the trend).