If there was ever a time to think hard about presidential power, that time is now. That's a very broad question, but the part most relevant for this blog is the President's role in controlling government regulation. There is no question that presidents have and will continue to have a huge influence on regulatory policy. The question is whether that influence is in need of checks and balances. In a forthcoming paper, *Presidential Administration under Trump*, I argue that the answer is yes. Rather than throwing the full weight of legal doctrine behind presidential authority, we should be careful to preserve the ability of agencies – and especially their professional staff—to push back against the White House.

Maybe that seems obvious to you, but the conventional wisdom among scholars is probably the opposite. Just after the end of the Clinton Administration, while she was still a professor at Harvard, an article by Elena Kagan celebrated the rise of what she called presidential administration. She meant to highlight and defend the dominance of the president over regulatory policy. Her article has had tremendous influence and has become the prevailing view in many circles.

But Kagan herself knew that the future might call for different conclusions. As she said, "the practice of presidential control over administration likely will continue to evolve in ways that raise new issues and cast doubt on old conclusions." Three presidents later, it's time to take a second look.

Kagan emphasized that during the Clinton Administration, the White House deferred to agencies' scientific expertise and was careful about observing legal requirements. Neither is true of the Trump White House. Nor does the White House exhibit the kind of deep immersion in policy and coherent viewpoint that Kagan identified in the Clinton years.

In particular, I argue that presidential authority needs to be limited in several ways. To begin with, I reject her argument that presidents should have the power to issue binding legal directives to agency heads about regulatory matters. In practice, since they have the ability to fire the heads of agencies like EPA, presidents will always have tremendous influence. But when push comes to shove, an agency head should be able to force the White House to a choice: pay the political cost of firing the administrator or leave the agency head free to act.

Similarly, I reject arguments by Kagan and others that courts should give greater deference to agency decisions when the White House has set policy. Quite the contrary. Deference should be lower when decisions are made by the White House

rather than the agency that Congress has assigned to make them. This should be especially true of matters requiring scientific expertise.

“Isn’t Trump just a unique exception?,” you might ask. Yes and no. He’s certainly an extreme case. But the Bush Administration was also prone to overrule agency scientists, and even the Obama Administration did so on occasion (as with the morning-after pill). And both past Administrations had to contend with claims that they were violating the rule of law – take your pick of which one you’d apply this charge to, but the odds are you agree that it’s true about one or the other. So Trump is an extreme case, but actions by his predecessors don’t necessarily fit with Kagan’s assumptions either.

Before I’m accused of believing in technocracy or rule by faceless bureaucrats, I’d point out that presidents have no lack of legitimate ways of shaping agency policy. First and foremost, they appoint agency leaders with the advice and consent of the Senate. They also have a mighty club in the power to fire nearly all agency heads at will. They’ve established an office (OIRA) to ensure that they’re aware of everything the government is doing in the regulatory sphere. There’s no reason that legal doctrines should be warped to give them even more power than that.