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# EXECUTIVE ORDERS AS LAWFUL LIMITS ON AGENCY POLICYMAKING DISCRETION

*Adam J. White\**

## INTRODUCTION

Agencies are bound generally by the Administrative Procedure Act's rulemaking requirements, but Presidents emphatically are not.<sup>1</sup> That dichotomy presents an interesting question: If a President orders an agency to adopt a specific policy in a rulemaking, and if his chosen policy fits within the broader limits of discretion that Congress conferred upon the agency in its substantive statute, then to what extent does the APA still obligate the agency to respond to criticism of the President's chosen policy in the notice-and-comment rulemaking process?

In the D.C. Circuit, at least, the answer is simple: if the President orders an executive agency to take action within the lawful limits of the agency's substantive statute and the agency implements that policy choice through a rulemaking, then the agency is *not* required to respond to public comments challenging the merits of the President's policy choice.<sup>2</sup>

In this Article, I consider principles and trends that preceded—and, I think, justify—this doctrinal development, rightly understood. After briefly retracing previous Presidents' general uses of executive orders and debates over presidential power more generally, culminating with the late twentieth-century executive orders on White House regulatory oversight, I review the case of *Sherley v. Sebelius*, in which the D.C. Circuit held that when an agency receives an executive order lawfully cabinining or directing the its regulatory discretion, it is excused from its otherwise general duty to respond to rulemaking comments challenging its policy choice.<sup>3</sup> Then, examining this general duty of agencies to respond to rulemaking comments, I consider

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1 *Dalton v. Specter*, 511 U.S. 462, 468 (1994) (“We concluded . . . that the APA does not apply to the President.”); *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

2 *Sherley v. Sebelius*, 689 F.3d 776, 784–85 (D.C. Cir. 2012).

3 *Id.*

whether the D.C. Circuit’s approach comports with the values and purposes underlying that duty.

This is a question of more than merely theoretical or scholarly interest. Recent Presidents have proven increasingly willing to use executive orders to drive substantive rulemakings, most recently on issues such as financial policy,<sup>4</sup> energy policy,<sup>5</sup> infrastructure development,<sup>6</sup> and land-use policy.<sup>7</sup> If Presidents continue that trend by including more specific policy directives in executive orders, then substantial policy questions increasingly will be implemented by agencies at the President’s direction—thus reducing, at least in part, the range of issues subjected to the ordinary notice-and-comment process.

Which is to say, executive orders may become a prominent presidential “trump card” in the rulemaking process, a logical extension of decades of increasing presidential responsibility for the modern administrative state.

## I. EXECUTIVE ORDERS AND PRESIDENTIAL POWER

### A. *Executive Orders: Ascertained by Substance, Not Form*

Although presidential action has been a central feature of American governance from the start (as recounted very briefly in Section II.B, below) and studied at untold length, “executive orders” are a form of presidential directive that lacks a formal legal definition. Neither Congress, nor the President, nor the Supreme Court has attempted to clearly define and demarcate them. Even the 1948 executive order expressly focused on the “preparation, presentation, filing, and publication of Executive orders and proclamations” did not attempt to define “executive order.”<sup>8</sup>

In the most general sense, an executive order is a presidential directive that binds executive branch officials and sometimes also binds the public with the force of law.<sup>9</sup> As the Supreme Court explained in *The Steel Seizure Case*, an executive order lawfully binds the public when it “stem[s] either

4 Exec. Order No. 13,772, 82 Fed. Reg. 9965 (Feb. 8, 2017) (“Core Principles for Regulating the United States Financial System”).

5 Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017) (“Promoting Energy Independence and Economic Growth”).

6 Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017) (“Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects”).

7 Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Mar. 3, 2017) (“Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’ Rule”).

8 See Exec. Order No. 10,006, 13 Fed. Reg. 5927 (Oct. 12, 1948) (“Preparation, Presentation, Filing, and Publication of Executive Orders and Proclamations”), cited in H. COMM. ON GOV’T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 n.1 (1957), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015034716152;view=lup;seq=3> [hereinafter HOUSE STUDY].

9 See Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 597 (2005).

from an act of Congress or from the Constitution itself.”<sup>10</sup> More recently, in *Dames & Moore v. Regan*, the Court suggested that executive orders might even obtain the force of law based on Congress’s tacit acquiescence.<sup>11</sup>

Thus, executive orders are best ascertained by their substance, not their form. As a seminal study published by the U.S. House Committee on Government Operations observed in 1957:

Executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law.

There is no law or even Executive order which attempts to define the terms “Executive order” or “proclamation.” In the narrower sense Executive orders and proclamations are written documents denominated as such. . . .

Executive orders are generally directed to, and govern actions by, Government officials and agencies. They usually affect private individuals only indirectly. . . .

Since the President has no power or authority over individual citizens and their rights except where he is granted such power and authority by a provision in the Constitution or by statute, the President’s proclamations are not legally binding and are at best hortatory unless based on such grants of authority.<sup>12</sup>

The difficulty in drawing bright lines between “executive orders” and other presidential documents owes to the fact that a document’s form does not define its substantive effect and vice versa. The Office of Legal Counsel (OLC) explained this in a 2000 opinion: “As this Office has consistently advised, it is our opinion that there is no substantive difference in the legal effectiveness of an executive order and a presidential directive that is [not] styled . . . as an executive order.”<sup>13</sup>

“We are aware of no basis for drawing a distinction as to the legal effectiveness of a presidential action based on the form or caption of the written document through which that action is conveyed,” OLC further explained. It added, “[i]t has been our consistent view that it is the substance of a presidential determination or directive that is controlling and not whether the

10 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *see also* *Ass’n for Women in Sci. v. Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977) (holding that an executive order had “a distinct statutory foundation,” and thus was “to be accorded the force and effect of a statute”).

11 *Dames & Moore v. Regan*, 453 U.S. 654, 680–81 (1981); *see also* *United States v. Midwest Oil Co.*, 236 U.S. 459, 475 (1915) (holding that Congress implicitly granted power to the President by acquiescence, because Congress had not expressly objected to “a multitude of orders extending over a long period of time and affecting vast bodies of land”).

12 HOUSE STUDY, *supra* note 8, at 1. In the subsequent six decades, this House report has been cited repeatedly on this point. *See, e.g.*, VIVIAN S. CHU & TODD GARVEY, CONG. RESEARCH SERV., RS20846, EXECUTIVE ORDERS: ISSUANCE, MODIFICATION, AND REVOCATION I (2014); Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 6 (2002); Stack, *supra* note 9, at 547 n.19.

13 Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 O.P. O.L.C. 29, 29 (2000).

document is styled in a particular manner. This principle plainly extends to the legal effectiveness of a document styled as a ‘presidential directive.’”<sup>14</sup>

The federal government’s modern approach to publishing and numbering executive orders dates only to 1907, when scattered executive orders issued by previous Presidents were retroactively numbered. The numbering project was nonexhaustive. Indeed, through the nation’s first century Presidents often issued executive orders that did not identify themselves as such; thus, when the House committee produced its 1957 study of executive orders, it cited not just clear examples of executive “orders” but also informal notes signed by the President that “*might* be construed as Executive orders.”<sup>15</sup> Even after 1907, executive orders were such a “haphazard operation both as to form and procedure”<sup>16</sup> that Erwin Griswold took to the pages of the *Harvard Law Review* to complain that executive orders tended to be “printed on a single sheet of paper, fragile and easily lost.”<sup>17</sup> “And yet,” he added, “these ephemera have the ‘force and effect of law.’”<sup>18</sup> A year later, Congress passed the Federal Register Act, providing for the publication of executive orders and rulemakings,<sup>19</sup> and in 1936 President Franklin D. Roosevelt signed Executive Order 7298, which standardized the process for publishing executive orders—but, as usual, did not attempt to define the term “executive order.”<sup>20</sup>

Thus, for purposes of this Article, “executive order” refers to presidential orders or directives that are intended to bind executive officers or the public at large with the force of law, in terms of substance rather than form.

### *B. Executive Orders as a Means of Administration: Energy in the Executive, from the Start*

Alexander Hamilton’s argument for “energy in the executive” is well known—but perhaps is still not known well enough. For while Federalist 70’s argument for executive power is remembered primarily in terms of foreign policy and national defense,<sup>21</sup> Hamilton took care to stress that “[e]nergy in

14 *Id.*

15 HOUSE STUDY, *supra* note 8, at 35 (emphasis added).

16 William D. Neighbors, Comment, *Presidential Legislation by Executive Order*, 37 U. COLO. L. REV. 105, 107 (1964).

17 Erwin N. Griswold, *Government in Ignorance of the Law—A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 (1934).

18 *Id.* at 205; *cf.* 24 Op. O.L.C. at 29 (citing an FDR-era DOJ memo “concluding that a letter from President Roosevelt stating the government’s policy ‘constitute[d] a Presidential directive having the force and effect of law,’ notwithstanding its informality of form” (alteration in original)).

19 Neighbors, *supra* note 16, at 107.

20 Exec. Order No. 7298, 1 Fed. Reg. 2284 (Feb. 18, 1936).

21 *See, e.g.,* Hamdi v. Rumsfeld, 542 U.S. 507, 580–81 (2004) (Thomas, J., dissenting) (“The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation’s foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains.”).

the Executive is a leading character in the definition of good government” in *domestic* governance, too:

It is essential to the protection of the community against foreign attacks; *it is not less essential to the steady administration of the laws*; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy. . . .

A feeble Executive implies a feeble execution of the government. *A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.*<sup>22</sup>

In that way, executive orders can be a means toward the Hamiltonian goal of good government, a transmission belt by which the President’s energy is conveyed to executive-branch officials administering the laws on the President’s behalf and under his general oversight.<sup>23</sup>

This theory was inspired by the young nation’s recent experience with government lacking true executive power,<sup>24</sup> by the experience of the pre-Constitution states,<sup>25</sup> and even by some of the conduct of King George III in the prerevolutionary era,<sup>26</sup> and the theory was put into practice from the start by President Washington. In June 1789, just three months into his first term in office, President Washington sent letters to the then-acting Secretaries of War and of the Treasury, and the Postmaster General and the Board of Treasury (who were held over from the prior government pending appointment of officers under the new Constitution), asking them to report back “a full, precise, and distinct general idea of the affairs of the United States.”<sup>27</sup>

22 THE FEDERALIST NO. 70, at 354 (Alexander Hamilton) (Ian Shapiro ed., 2009) (emphasis added).

23 *Myers v. United States*, 272 U.S. 52, 117 (1926) (“The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this Court.”).

24 See, e.g., LLOYD MILTON SHORT, THE DEVELOPMENT OF NATIONAL ADMINISTRATIVE ORGANIZATION IN THE UNITED STATES 35–77 (1923); CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY 1775–1789, at 45–64 (1923).

25 See, e.g., FEDERALIST NOS. 69, 70 (Alexander Hamilton).

26 It is important to recall that the Declaration of Independence’s list of grievances against King George III begins not with criticisms of his heavy-handedness, but rather with criticisms of his *failure* to see that laws were enacted or enforced. See, e.g., THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“He has forbidden his Governors to pass Laws of immediate and pressing Importance, unless suspended in their Operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.”).

27 See Letter from President George Washington, to John Jay, Acting Sec’y for Foreign Affairs (June 8, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON 343, 344 (John C. Fitzpatrick ed., 1939) (emphasis omitted), quoted in Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 273–74 (2001).

One New Deal Era study identifies this as the first executive order.<sup>28</sup> That same study identifies the second executive order as Washington's 1789 directive to territorial officials, ordering them to take measures necessary to ascertain the intentions of certain Indian tribes and authorizing them to call up the militia from Virginia and Pennsylvania as necessary; as to the latter point, Washington noted that he was transmitting a copy of that order to the two states' governors, "so that there may not be any obstructions to such measures as shall be necessary to be taken by you."<sup>29</sup> Similarly, President Washington's 1793 proclamation of neutrality among Great Britain and France ordered officers to prosecute in federal courts any violations of the law of nations.<sup>30</sup>

At risk of understatement, the role of Presidents in managing domestic policy did not end with the first generation of Presidents; indeed, *Marbury v. Madison* arose from President Jefferson's order to Secretary of State Madison, directing him not to deliver the commission to Mr. Marbury.<sup>31</sup> As Hamilton expected, presidential power became not merely a tool of foreign policy and national defense, nor was its use in domestic policy limited to major policy matters.

And as Leonard White recounts in his multivolume study of early American governance, antebellum Presidents such as James Polk were "condemned" by "law and practice . . . to be in fact the 'city managers' of the federal government, although no present city manager in a large town would

28 LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS I (Clifford L. Lord ed., 1979). But on its face, Washington's letter arguably stops short of "ordering" anything; he seemingly tempered his request in light of the fact that the government was not yet fully established: "Although in the present unsettled state of the Executive Departments, under the government of the Union, I do not conceive it expedient to call upon you for information officially; yet I have supposed that some informal communications from the Office of foreign Affairs might neither be improper or unprofitable." 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 27, at 343.

29 LIST AND INDEX OF PRESIDENTIAL EXECUTIVE ORDERS, *supra* note 28, at 1; Letter from President Washington, to Arthur St. Clair, Governor of the W. Territory (Oct. 6, 1789), in I AMERICAN STATE PAPERS: INDIAN AFFAIRS 96-97 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

30 President George Washington, Proclamation of Neutrality (Apr. 22, 1793), [http://avalon.law.yale.edu/18th\\_century/neutra93.asp](http://avalon.law.yale.edu/18th_century/neutra93.asp) ("And I do hereby also make known, that whatsoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding, or abetting hostilities against any of the said Powers, or by carrying to any of them those articles which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture; and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the law of nations, with respect to the Powers at war, or any of them."). This proclamation has been cited by several studies as an early executive order. See, e.g., Gaziano, *supra* note 27, at 275.

31 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 144 (1803) (reporting that Marbury's counsel conceded that Madison, in performing nonministerial duties, was "bound to obey [the President's] orders, and accountable to him for his conduct"); see also Neighbors, *supra* note 16, at 109.

bother with the detail that Presidents handled.”<sup>32</sup> The nation’s business expanded quickly but “better technical means of disposing of it . . . were slow to emerge,” so that Presidents “manfully read reports, held conferences, studied individual cases, gave directions, and signed a staggering number of documents.”<sup>33</sup>

Nor were Presidents’ orders limited to matters of internal executive-branch operation. As the aforementioned 1957 House Committee staff report observes, the “first administrations used Executive orders for such purposes as the withdrawal of public lands for Indian use, for military and naval functions, and for the erection of lighthouses, as well as for the establishment, transfer, and abolition of land districts and land offices and supplementing of acts of Congress.”<sup>34</sup>

And for still more purposes: President Lincoln famously used executive orders not just in war zones but also in domestic Union territory, such as by ordering General Scott to monitor the fraught situation in Annapolis and, “in the extremest necessity, [suspend] the writ of *habeas corpus*.”<sup>35</sup> Months later, he signed an executive order authorizing General Scott to suspend the writ “between the city of New York and the city of Washington.”<sup>36</sup> After the war, President Andrew Johnson used an executive order to declare that any Virginians attempting to continue the Confederate government within the state “shall be deemed and taken as in rebellion against the United States, and shall be dealt with accordingly.”<sup>37</sup> In that same order, Johnson announced directives, broadly, for various federal departments—among others, that the “Secretary of the Interior will also put in force the laws relating to the Department of the Interior.”<sup>38</sup>

The trend of direct presidential involvement and decisionmaking in domestic policy continued well after the Civil War. As Leonard White writes, “Cabinet meetings were regularly scheduled and most, if not all, major questions of policy, tactics, and administration came up for discussion, as well as the perennial problems of patronage.” Presidents also met often with individual cabinet secretaries one-on-one, to privately resolve issues specific to the given department.<sup>39</sup>

Executive orders during and after Reconstruction, too, had significant impact on the rights of third parties. In 1876, for example, President Grant issued an executive order prohibiting the sale of ammunition in Indian coun-

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32 LEONARD D. WHITE, *THE JACKSONIANS* 70 (1954).

33 *Id.* at 69.

34 HOUSE STUDY, *supra* note 8, at 35.

35 President Lincoln, Executive Order (Apr. 25, 1861), in 2 ABRAHAM LINCOLN: COMPLETE WORKS, at 38 (John G. Nicolay & John Hay eds., 1894).

36 President Lincoln, Executive Order (July 2, 1861), in 2 ABRAHAM LINCOLN: COMPLETE WORKS, *supra* note 35, at 54.

37 President Johnson, Executive Order (May 9, 1865), in 4 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 337 (James D. Richardson ed., 1897).

38 *Id.* at 38.

39 LEONARD D. WHITE, *THE REPUBLICAN ERA* 100–01 (1958).



try, pursuant to a joint resolution by Congress that had authorized him to take such action.<sup>40</sup> In 1906, President Theodore Roosevelt issued a “proclamation” to set aside public lands in Wyoming as the “Devils Tower National Monument,” pursuant to the Antiquities Act, thus preventing their development.<sup>41</sup>

Thus, by 1907, when the State Department began to retroactively identify and assign numbers to prior executive orders (beginning with President Lincoln’s 1862 order establishing a provincial court in Louisiana),<sup>42</sup> the nation had more than a century’s experience in presidential exercises of power akin to modern “executive orders.” And in the years immediately following, executive orders took on still greater domestic regulatory weight. In World War I, the 1957 House study explained, “Executive orders set up agencies like the War Trade Board, the Grain Corporation, the Committee on Public Information, and the Food Administration”; and in the early 1930s, “the . . . heyday of the Executive order,” Presidents’ orders were the means by which “codes of fair competition under the National Industrial Recovery Act were approved, the bank holiday was ended, and much of the administrative organization for farm loans and agricultural relief [was] set up.”<sup>43</sup>

Executive orders reached a “heyday” in the early New Deal precisely because their modern growth and use tracked the larger modern debate over presidential power. FDR issued far more executive orders (3721) than any other president; even when the numbers are figured in terms of executive orders per year, FDR’s annualized output (307) still far outpaces his closest competitor, President Hoover (242).<sup>44</sup> As Tara Branum observes, FDR’s use of executive orders reflected his fundamental view, expressed in his first inaugural address,<sup>45</sup> that the nation’s condition “may call for temporary depart-

40 President Grant, Executive Order (Nov. 23, 1876), in 1 ANNUAL REPORT OF THE SECRETARY OF THE INTERIOR ON THE OPERATIONS OF THE DEPARTMENT FOR THE YEAR ENDED JUNE 30, 1879, at 72 (1879).

41 Proclamation No. 658, 34 Stat. 3236 (1906).

42 See HOUSE STUDY, *supra* note 8, at 37; Branum, *supra* note 12, at 8; see also *Burke v. Miltenberger*, 86 U.S. 519, 519–20 (1873).

43 HOUSE STUDY, *supra* note 8, at 36.

44 Tallies for each President’s executive orders are collected and published by the American Presidency Project at the University of California, Santa Barbara. Gerhard Peters & John T. Woolley, *Executive Orders*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/data/orders.php> (last updated Mar. 20, 2018). But its figures cannot be taken as definitive, given the looseness with which the government long categorized and tracked them. See *id.* Other scholars have tallied them differently. See, e.g., Branum, *supra* note 12, at 28 (explaining that FDR “used his executive authority to issue 3723 executive orders, more than twice as many as Woodrow Wilson had issued during World War I” (citing WILLIAM J. OLSON & ALAN WOLL, CATO INST. POLICY ANALYSIS NO. 358, EXECUTIVE ORDERS AND NATIONAL EMERGENCIES: HOW PRESIDENTS HAVE COME TO “RUN THE COUNTRY” BY USURPING LEGISLATIVE POWER 13 (1999))); Robert V. Percival, Essay, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 982 (2001) (citing JOHN CONTRUBIS, CONG. RESEARCH SERV., R95-772, EXECUTIVE ORDERS AND PROCLAMATIONS 26 (1999)) (ascribing 3728 executive orders to FDR).

45 Branum, *supra* note 12, at 28.

ture from that normal balance of public procedure” among the executive and legislative branches, and that he would not hesitate to “ask the Congress for the one remaining instrument to meet the crisis—broad Executive power to wage a war against the emergency, as great as the power that would be given to me if we were in fact invaded by a foreign foe.”<sup>46</sup>

FDR was building upon the work of at least two recent similarly minded predecessors. Two decades earlier, Teddy Roosevelt (TR) issued over 1000 executive orders during his seven-year presidency,<sup>47</sup> consistent with his “stewardship” theory of presidential power.<sup>48</sup> He added that:

[I]t was not only [a president’s] right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws. Under this interpretation of executive power I did and caused to be done many things not previously done by the President and the heads of the departments. I did not usurp power, but I did greatly broaden the use of executive power.<sup>49</sup>

TR was particularly energetic in using executive orders to advance his broader domestic policy of national conservation, such as in his aforementioned Devils Tower order.<sup>50</sup>

By the same token, President Wilson’s still greater use of executive orders—issuing 1803 of them in his eight-year presidency<sup>51</sup>—comported with his own preference for executive energy over legislative deliberation, having written years earlier that the President “is the only national voice in affairs,” who, with the support of the people, is an “irresistible” political force, because the nation’s “instinct is for unified action, and it craves a single leader.”<sup>52</sup>

46 First Inaugural Address of President Franklin Delano Roosevelt, in *INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 269 (Bicentennial ed. 1989).

47 According, again, to the American Presidency Project at the University of California, Santa Barbara. Peters & Woolley, *supra* note 44.

48 See THEODORE ROOSEVELT, *AN AUTOBIOGRAPHY* 357 (1913); see also *id.* (“The most important factor in getting the right spirit in my Administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people, was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. . . . I declined to adopt the view that what was imperatively necessary for the Nation could not be done by the President unless he could find some specific authorization to do it.”).

49 *Id.*

50 See, e.g., William H. Rodgers, Jr., *Executive Orders and Presidential Commands: Presidents Riding to the Rescue of the Environment*, 21 *J. LAND, RESOURCES, & ENVTL. L.* 13, 21–23 (2001); Lorraine Boissonneault, *The Debate over Executive Orders Began with Teddy Roosevelt’s Mad Passion for Conservation*, *SMITHSONIAN MAG.* (Apr. 17, 2017), <http://www.smithsonianmag.com/history/how-theodore-roosevelts-executive-orders-reshaped-countryand-presidency-180962908/#HeKpIbPflqjPLSL.99>.

51 According, once again, to the American Presidency Project at the University of California, Santa Barbara. Peters & Woolley, *supra* note 44.

52 WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 68 (1908).

But FDR's embrace of executive orders in the management of domestic policy also echoed and built upon the Supreme Court's defense of presidential management of public administration in *Myers v. United States*.<sup>53</sup> The Court, led by the Chief Justice more directly familiar with the presidency than any other, characterized executive branch officers as nothing less than the President's "alter ego," their actions reflecting not their own discretion, but his:

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. . . . The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. *The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion.* This field is a very large one. It is sometimes described as political. Each head of a department is and must be the President's *alter ego* in the matters of that department where the President is required by law to exercise authority.<sup>54</sup>

And the Court did not limit this category to major issues of policy, or matters expressly reserved by statute to presidential control. Rather:

The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by Acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him *in a thousand acts to which it can hardly be supposed his personal attention is called*, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers *must* do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. . . .

The duties of the heads of departments and bureaus *in which the discretion of the President is exercised* and which we have described, are the most important in the whole field of executive action of the Government.<sup>55</sup>

Thus, even though a President surely lacks the practical resources and capacity to *actually* oversee all policymaking by his agencies,<sup>56</sup> the Court's unani-

53 272 U.S. 52 (1926).

54 *Id.* at 132–33 (1926) (first emphasis added) (citation omitted).

55 *Id.* at 133–34 (emphasis added) (quoting *In re Neagle*, 135 U.S. 1, 63 (1890)) (internal quotation marks omitted).

56 *Cf.* JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* 49 (2012) ("In reality, these broad delegations of authority were delegations to other administrators who would be accountable to the President—to the extent that he had the time and resources to supervise them.").

mous opinion in *Myers* recognized the need to preserve the President's *option* to manage and intervene as necessary.

This view of the President, as chief of the administrative departments, did not originate with *Myers*,<sup>57</sup> but *Myers* energized proponents of this doctrine—especially the subsequent Roosevelt administration. This was exemplified, famously, by the administration's argument in *Humphrey's Executor v. United States* that Congress lacked constitutional power to impose statutory limitations on the President's power to remove at-will an FTC commissioner, because such limits would be a "substantial interference with the constitutional duty of the President to 'take care that the laws be faithfully executed.'"<sup>58</sup> That is, execution of federal statutes, especially "in the case of those officers entrusted with the task of enforcing new legislation, such as the Securities Act of 1933, which embodies new concepts of Federal regulation in the public interest," requires officers to vindicate "the purposes and policy of the law"—as determined by the judgment of the President.<sup>59</sup>

The FDR administration's arguments failed to convince any Justices,<sup>60</sup> but its characterization of all agency action as effectively *executive* policymaking, needing Presidential oversight,<sup>61</sup> prevailed in the long run. Less than two years after his administration's arguments for presidential control of independent agencies were rejected in *Humphrey's Executor*, President Roosevelt urged to Congress, in his letter accompanying the Brownlow Committee Report, that "[t]he plain fact is that the present organization and equipment of the executive branch of the Government defeats the constitutional intent that there be a single responsible Chief Executive to coordinate and manage the departments and activities in accordance with the laws enacted by the Congress," and he called on Congress to restructure the agencies to make them more directly controllable by the President.<sup>62</sup> Within two generations, FDR's argument in that letter, and in *Humphrey's Executor*, would be the intellectual zeitgeist for regulatory oversight among Democrats and Republicans alike, informing the development of *Chevron* and modern administrative law doctrines.<sup>63</sup>

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57 Three years before the *Myers* case, for example, a study of federal administrative power observed "the fact that the President is now generally looked upon by all political parties, by administrative officers, by the public, and even by Congress itself, as the head of the administration." SHORT, *supra* note 24, at 23.

58 Brief for the United States at 23, *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935) (No. 667), 1935 WL 32965, at \*23.

59 *Id.*

60 *Humphrey's Ex'r*, 295 U.S. at 632 (ruling unanimously against FDR).

61 See, e.g., Brief for the United States, *supra* note 58, at \*24–26.

62 PRESIDENT'S COMM. ON ADMIN. MGMT., REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT IV (1937) [hereinafter BROWNLOW COMMITTEE REPORT].

63 I trace this evolution of conservative legal thought, which I call "Rooseveltian Means to Reaganite Ends," in my contribution to a recent book on the "imperial presidency." Adam J. White, *The Administrative State and the Imperial Presidency: Then and Now*, in THE IMPERIAL PRESIDENCY AND THE CONSTITUTION 23 (Gary J. Schmitt et al. eds., 2017); see also

C. *Executive Power and the Modern Administrative Process*

While *Myers* and *Humphrey's Executor* were being litigated to determine the nature of the presidential power to remove federal officials, a broader conversation—or argument—was underway among policymakers, politicians, and scholars regarding the process of federal administration.<sup>64</sup> And in those years-long deliberations, the power of the President to direct the agencies' rulemaking process did not go undiscussed.

The Brownlow Committee's report on administrative management, for example, included an entire section focused on the relationship between the President and the rulemaking process.<sup>65</sup> In that section, author James Hart traced the Constitution's vesting of "the executive power" in the President, and Hamilton's arguments for executive power, forward to the burgeoning administrative state, and concluded that the President had (and must have) outright "power of direction" over agencies' rulemaking activities. Indeed, Hart argued that even when statutes are written to delegate power to the agency per se, rather than to the President, Congress "necessarily does so on the condition that the President is in a position to instruct them as to how this discretion shall be exercised."<sup>66</sup> And when the President chooses to direct an agency's rulemaking activities, Hart explained, "he may . . . do this in conversation, by letter, or by Executive order."<sup>67</sup>

But when Congress enacted the Administrative Procedure Act (APA) in 1946, it included no specific provision for presidential control of the rulemaking process. And the APA's legislative history was silent on the subject.<sup>68</sup>

In the absence of a express provision for or against presidential management of the rulemaking process, Presidents began to claim greater systematic authority. President Nixon is often credited with beginning this trend, by his White House's oversight of EPA rulemakings and its establishment of "Quality of Life Review," a process by which agencies were required to provide the White House's Office of Management and Budget (OMB) with their proposed and final rules, along with economic analyses of their rules, to be circu-

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*The Federal Way*, 10 NAT'L REV. 9 (William F. Buckley, Jr. ed., 1961) (applauding James Landis's criticism of independent commissions, but criticizing Landis's proposal to replace those independent commissions with executive agencies as a "nasty shock" that "runs directly counter to the original intent of Congress," and which mirrors FDR's failed attempt to remove FTC Commissioner Humphrey).

64 See, e.g., George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

65 BROWNLOW COMMITTEE REPORT, *supra* note 62, at 329–34.

66 *Id.* at 331.

67 *Id.*

68 See Administrative Procedure Act, 5 U.S.C. §§ 551, 553–559, 701–706 (2012); see also U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (not mentioning whether the President claims directive power over the rulemaking process).

lated among other agencies for review.<sup>69</sup> To Nixon's basic framework for centralized interagency review, President Ford added a requirement that all agencies submit their proposed rules and their evaluation of the rules' likely inflationary impact to the White House's Council on Wage and Price Stability.<sup>70</sup>

When President Carter succeeded President Ford, the change of political party controlling the White House did not break the burgeoning trend of agency oversight; rather, Carter issued an executive order requiring all executive agencies to publish a semiannual regulatory agenda; to precede significant new regulations with a review of alternative approaches; to consider significant new regulations' "direct and indirect effects," as well as their likely reporting burdens; and to prepare a full regulatory analysis of all "major" rules that were likely to cost \$100 million annually or that were likely to have major impacts on costs or prices.<sup>71</sup> President Carter also established the Regulatory Analysis Review Group, an interagency body chaired by the Council of Economic Advisers, to review the costs of a small sample of major rules each year, and he also created the Regulatory Council, another interagency body intended to "help ensure that regulations are well coordinated, do not conflict, and do not impose excess burdens on particular sectors of the economy."<sup>72</sup>

Pildes and Sunstein suggest that the review group actually "reviewed relatively few rules, though the President did resolve a few highly controversial issues."<sup>73</sup> Similarly, Justice Kagan reports (though again without citation) that "all parties understood final decisionmaking authority to rest with the initiating agency."<sup>74</sup> But this might understate the significance of the Carter White House's interventions. Paul Verkuil's contemporaneous study of the White House's intervention in three significant rulemakings—the Labor Department's "Cotton Dust" rule, an EPA rule for ozone, and an Interior Department rule on strip mining—reported that the new intervention "pro-

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69 See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2276 (2001); Alan B. Morrison, Commentary, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1061 (1986); Jim Tozzi, *OIRA's Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA's Founding*, 63 ADMIN. L. REV. 37, 46–47 (2011); see also Andrew Rudalevige, *Regulation Beyond Structure and Process*, NAT'L AFF., Winter 2018, at 93 (tracing the history of OMB/OIRA oversight).

70 Exec. Order. No. 11,821, 3 C.F.R. 926 (1975); Kagan, *supra* note 69, at 2276; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 14 (1995).

71 Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

72 Richard A. Merrill, *Regulation of Toxic Chemicals*, 58 TEX. L. REV. 463, 466 n.12 (1980) (reviewing MARSHALL S. SHAPO, *A NATION OF GUINEA PIGS* (1979)) (quoting Memorandum on Federal Regulatory Management, 14 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1883, 1905 (1978) (internal quotation marks omitted)); see also Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 548–49 (1989).

73 Pildes & Sunstein, *supra* note 70, at 14.

74 Kagan, *supra* note 69, at 2276–77.

duced dismay among the participants and, in some instances, consternation among the regulators as well.”<sup>75</sup> In the case of the Cotton Dust rule, Labor Secretary Ray Marshall “objected to [the White House’s] interference,” but ultimately acquiesced.<sup>76</sup>

Other critics pressed their objections further, in court. Arguing that the EPA’s nonpublic deliberations with the White House and other executive agencies violated the D.C. Circuit’s rules on *ex parte* communications,<sup>77</sup> critics of the EPA’s final rule challenged the rule in court—only to receive from the D.C. Circuit an emphatic endorsement of presidential oversight of the rulemaking process. Construing the Clean Air Act’s transparency provisions as not applying to “intra-executive contacts” (at least in matters not involving agency adjudications or “quasi-adjudicatory proceedings”), Judge Wald’s opinion for the court ranged far beyond mere questions of docketing executive officials’ *ex parte* communications with the agency. The court invoked the President’s powers and duties as the Constitution’s exclusive recipient of “the executive power” to undergird broader presidential authority over agencies:

The court recognizes the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy. . . . The executive power under our Constitution, after all, is not shared—it rests exclusively with the President. . . . To ensure the President’s *control and supervision* over the Executive Branch, the Constitution—and its judicial gloss—vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy.<sup>78</sup>

The court further urged that presidential “control” of agencies’ rulemaking is necessary to ensure the coherence of policy across agencies and the consistency of each agency’s policies with the broader policy judgments of the President himself:

The authority of the President to control and supervise executive policymaking is derived from the Constitution; the desirability of such control is demonstrable from the practical realities of administrative rulemaking. Regulations such as those involved here demand a careful weighing of cost, envi-

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75 Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943, 944–47 (1980).

76 *Id.* at 945.

77 *See, e.g., Ass’n of Nat’l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1168–70 (D.C. Cir. 1979); *Action for Children’s Television v. FCC*, 564 F.2d 458, 468–78 (D.C. Cir. 1977); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 51–59 (D.C. Cir. 1977) (*per curiam*).

78 *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981) (*emphasis added*) (*footnote omitted*); *see also C. Boyden Gray, Presidential Involvement in Informal Rulemaking*, 56 TUL. L. REV. 863, 867 (1982) (“Judge Wald’s opinion not only outlines the policy considerations justifying executive oversight of rulemaking activity, it also recognizes that the participation of the Executive Office of the President in resolving the policy issues presented in rulemaking proceedings is *not* comparable to the participation of other groups outside the agency. The President’s role is unique, both under our Constitution and as a matter of the practical realities of governing an extremely complex society.”).

ronmental, and energy considerations. They also have broad implications for national economic policy. Our form of government simply could not function effectively or rationally if key executive policymakers were isolated from each other and from the Chief Executive.<sup>79</sup>

The court's opinion had ramifications well beyond just the EPA's ozone rule, or the Carter administration, for it helped to put wind in the sails of the next administration's efforts to impose still further presidential oversight on the agencies' rulemaking efforts. Two months before the court issued its decision, the newly inaugurated President Reagan signed Executive Order 12291, further expanding and elaborating White House oversight of agencies' rules.<sup>80</sup> Most significantly, the order required executive agencies to analyze the likely costs and benefits of major rulemaking proposals, and to submit those analyses to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) for review.<sup>81</sup>

But the order went beyond mere procedural requirements: Executive Order 12291 required executive agencies, "to the extent permitted by law," to follow several *substantive* requirements.<sup>82</sup> In any given rulemaking, they were ordered to observe the following criteria, inter alia:

- "Regulatory action shall not be undertaken unless the potential benefits to society for the regulation outweigh the potential costs to society;"
- "Regulatory objectives shall be chosen to maximize the net benefits to society;" and
- "Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen."<sup>83</sup>

President Reagan's order spurred no shortage of criticism,<sup>84</sup> but as Paul Verkuil observed a year later, the order seemed well rooted in Judge Wald's opinion for the D.C. Circuit: "It is fair to say," Verkuil wrote, "that *Sierra Club* is now the starting point for any discussion on the subject of White House policymaking relations with executive agencies," including President Reagan's order.<sup>85</sup>

79 *Sierra Club*, 657 F.2d at 406 (footnotes omitted).

80 Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

81 *Id.* § 3.

82 *Id.* § 2.

83 *Id.* § 2(b)-(d).

84 See, e.g., Bruff, *supra* note 72; Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Morrison, *supra* note 69, at 1062-63; Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627 (1989). But see, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Peter M. Shane, *Presidential Regulatory Oversight and the Separation of Powers: The Constitutionality of Executive Order No. 12,291*, 23 ARIZ. L. REV. 1235 (1981); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 201 (1986).

85 Paul Verkuil, *Symposium on Presidential Control of Rulemaking: An Introduction*, 56 TUL. L. REV. 811, 815 (1982).



Justice Kagan suggests that both the order itself and the OLC opinion supporting the order stopped short of concluding that the President was genuinely “*dictat[ing]*” substantive agency decisions,<sup>86</sup> but on their face both documents did precisely that. As noted, the order established substantive requirements that the agencies were bound to follow: “all agencies, to the extent permitted by law, shall adhere to the following requirements.”<sup>87</sup> The caveat “to the extent permitted by law” conceded the President’s lack of authority to direct agencies to disobey statutes, but short of statutory prohibitions the order expressly bound agencies on these substantive points. Thus, Kenneth Culp Davis seemed on solid ground when he observed that Executive Order 12291 reflected the President’s assumption of “full power to control the content of rules issued by executive departments and agencies”—a development that he welcomed, so long as the White House undertook its control transparently.<sup>88</sup>

And while the OLC opinion conceded (as Justice Kagan notes) that Executive Order 12291 did not empower the Director of the Presidential Task Force on Regulatory Relief to “displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions,”<sup>89</sup> OLC stressed throughout the opinion that the agencies were bound to exercise their powers consistent with the President’s order, at least to the broadest possible extent not contradicting statutory commands:

The order does not empower the Director or the Task Force to displace the relevant agencies in discharging their statutory functions or in assessing and weighing the costs and benefits of proposed actions. . . . [And it] leaves a considerable amount of decisionmaking discretion to the agency. Under the proposed order, the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs. The agency would thus retain considerable latitude in determining whether regulatory action is justified and what form such action should take.<sup>90</sup>

In short, and as reiterated at the end of OLC’s analysis, the agency would still carry out its duties as originally specified by Congress—“the agency head, and not the President, would be required to calculate potential costs and benefits and to determine whether the benefits justify the costs”—yet in carrying out those duties the agency would further be “*required*” to

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86 Kagan, *supra* note 69, at 2278 (emphasis added).

87 Exec. Order No. 12,291 § 2.

88 See Kenneth Culp Davis, *Presidential Control of Rulemaking*, 56 TUL. L. REV. 849, 849 (1982).

89 Proposed Executive Order Entitled “Federal Regulation,” 5 Op. O.L.C. 59, 63 (1981). Justice Kagan indicates that this part of the OLC analysis pertained to the powers of the President or the OMB Director, but in fact it was focused specifically on the Director of the Presidential Task Force on Regulatory Relief. Compare Kagan, *supra* note 69, at 2278 n.126, with Proposed Executive Order Entitled “Federal Regulation,” 5 Op. O.L.C. 59 at 63–64.

90 Proposed Executive Order Entitled “Federal Regulation,” 5 Op. O.L.C. at 63.

apply the additional standards imposed upon it by the President's order.<sup>91</sup> In other words, the President's order simply narrowed the range of options available to the agency under its statutes: "[I]t does not purport wholly to displace, but only to *guide and limit*, discretion which Congress has allocated to a particular subordinate official."<sup>92</sup>

As political scientist Andrew Rudalevige observed in a recent pair of articles, the OIRA framework by which Presidents assert direct control of executive agencies and significantly affect their regulatory policies is now entrenched, precisely because it arose not through a single fiat but through the sustained efforts of many Presidents to assert and maintain that control.<sup>93</sup> This process culminated with the election of President Clinton, who reformed aspects of the OIRA framework but accepted and entrenched the basic premise of presidential control.

Specifically, his Executive Order 12866 did not disturb the basic premise that the President was exercising a power to direct executive agencies to exercise their statutory powers in specific ways, but rather he *ratified* his predecessors' assertions of power, thus giving the OIRA framework a bipartisan imprimatur. In fact, President Clinton's order appeared to go *farther* than the Reagan order, in that the order claimed authority for the President to personally direct rulemaking outcomes when disputes arise among agencies and OMB in the OIRA review process.<sup>94</sup> The order's inclusion of the now-familiar caveat, "to the extent permitted by law," might have left some ambiguity in this assertion of presidential power, but Justice Kagan concludes that "the fairly clear premise of the order was that the simple delegation of rulemaking authority to a specified agency head (the kind of delegation which underlies almost all regulations) would not prevent the President from making a final decision."<sup>95</sup>

#### D. Executive Power and Modern Administrative Law

The Presidents' executive orders framing up the modern OIRA oversight process, and setting substantive standards for agencies' application within that framework, often operated within fault lines of modern administrative law, in terms of scholarly debates regarding the nature of presidential power over agencies—in terms of both abstract theory and practical effect.

Specifically, President Reagan's issuance of Executive Order 12291 and his administration's implementation of that order reinvigorated scholarly

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91 *Id.* (emphasis added).

92 *Id.* at 61 (emphasis added).

93 See Rudalevige, *supra* note 69, at 106 ("Regulatory review did not instantly spring into being when Reagan signed his executive order; it came about only after more than a decade of effort prior to the Reagan administration, and it developed only because Reagan and his team invested in its maturation. . . . And Reagan's successors, of both parties, had to buy into the process."); see also Andrew Rudalevige, *Beyond Structure and Process: The Early Institutionalization of Regulatory Review* (Working Paper, 2017) (on file with author).

94 Exec. Order No. 12,866 § 7, 3 C.F.R. 569 (1994).

95 Kagan, *supra* note 69, at 2289.

debate over the precise nature of powers delegated by Congress to the executive branch, and questions regarding the precise nature of presidential oversight and control of the executive branch. Critics of presidential management of the rulemaking process objected that the President was exceeding the limits of his office by attempting to control the agencies' use of powers that had been delegated by Congress to the *agencies* per se, not to the President.

This criticism was presented well by Peter Strauss, who concludes that “where Congress has assigned a function to a named agency subject to its oversight and the discipline of judicial review, the President’s role—like that of the Congress and the courts—is that of *overseer* and not *decider*.”<sup>96</sup> This criticism often recognizes that Congress may well choose to delegate power specifically to the President,<sup>97</sup> but in the absence of such an express delegation, “the President cannot simply command or direct an agency head to issue a regulation.”<sup>98</sup>

But others replied that federal statutes were better read to support presidential control. Nina Mendelson argued that Congress’s mention of specific executive officers cannot be taken as conclusive evidence of congressional intent to prevent the President from directing the officers’ decisions, because the broader legal context of administrative action gives a firm basis on which to presume that “Congress is likely to expect potentially substantial presidential oversight of a wide range of executive branch agency actions,” and even that “the backdrop and legislative context of simple delegations [of power to executive agencies] . . . do not support the interpretation that [they] . . . are meant to insulate the agency from the exercise of presidential directive authority.”<sup>99</sup> Justice Kagan, too, reviews constitutional law and history and concludes that “a statutory delegation to an executive agency official . . . usually should be read as allowing the President to assert directive authority, as Clinton did, over the exercise of the delegated discretion.”<sup>100</sup>

Related to this debate was the parallel debate of “directive” authority and “removal” power. The President unquestionably has power to remove executive officers at will, at least in the absence of statutory provisions to the contrary.<sup>101</sup> But some scholars urge that this removal power does not imply

96 Peter L. Strauss, *Overseer, or “The Decider”? The President in Administrative Law*, 75 *GEO. WASH. L. REV.* 696, 704–05 (2007) (emphasis added); see also Peter L. Strauss, *Presidential Rulemaking*, 72 *CHI.-KENT L. REV.* 965, 984 (1997) (“[M]y conclusion is that the President is simply in error and diserves the democracy he leads when he behaves as if rulemakings were *his* rulemakings.”).

97 Percival, *supra* note 44, at 980–85; Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 *COLUM. L. REV.* 263, 293–96 (2006).

98 Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 *ADMIN. L. REV.* 1, 7 (2007).

99 Nina A. Mendelson, *Another Word on the President’s Statutory Authority over Agency Action*, 79 *FORDHAM L. REV.* 2455, 2459, 2461 (2011).

100 Kagan, *supra* note 69, at 2251.

101 *Morrison v. Olson*, 487 U.S. 654 (1988); *Myers v. United States*, 272 U.S. 52 (1926); *cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

an outright directive power over agency actions; a President wishing to prevail upon the decisions of an agency might secure his agency's compliance with explicit or implicit threats of firing the agency's leadership, but, the argument goes, in the end it remains the agency's choice to make in light of the removal threat.

Kenneth Culp Davis and others caution against placing too much weight upon this distinction. Asking whether Reagan's Executive Order 12291 effected a "transfer" of power from agencies to the President, Davis answers:

Technically no; in reality, yes. . . . The reality is, of course, that cabinet officers may be removed from office at the will of the President . . . [and thus a] request by the President or by his authorized representative that an agency in an executive department make a change in a proposed or final rule is likely to be honored.<sup>102</sup>

But even here Davis takes care to stress that he is talking about practical fact, not legal effect: "the power is transferred [by Executive Order 12291, from the agency to the President] only in fact, not in law."<sup>103</sup>

But one of Davis's predecessors, James Hart, drew a much more conclusive connection between the President's express constitutional power to remove officers and an implicit constitutional power to direct those officers. Years before authoring the Brownlow Committee Report's chapter on presidential management of agencies,<sup>104</sup> Hart's original study of presidential power over administrative agencies argued that the President's constitutional powers, especially the removal power, furnish "him, within certain limits, not only a *practical*, but also a *legal*, power of 'administrative control' over acts of department heads which involve a choice."<sup>105</sup> Those "limits" were, by Hart's view, very broad—namely, judicial review to control "abuse of power, or fraud, or excess of jurisdiction" and the like.<sup>106</sup> "Within those limits," Hart concluded, "the fact that the law [that is, the Constitution] allows the President a method of control must be deemed to constitute a recognition of his legal right to control."<sup>107</sup>

## II. JUDICIAL AFFIRMATION OF PRESIDENTIAL CONTROL: *SHERLEY V. SEBELIUS*

The aforementioned OIRA framework orders, Executive Orders 12291 and 12866, were not the only efforts by Presidents Reagan and Clinton (and later Presidents Bush Jr.<sup>108</sup> and Obama<sup>109</sup>) to direct substantive judgments by executive officers. As Justice Kagan observes, Presidents Reagan, Bush Sr.,

102 Davis, *supra* note 88, at 852–53 (citations omitted); *see also* Mendelson, *supra* note 99, at 2459.

103 Davis, *supra* note 88, at 853.

104 *See* BROWNLOW COMMITTEE REPORT, *supra* note 62.

105 JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 192 (1925) (emphasis added).

106 *Id.*

107 *Id.*

108 Exec. Order No. 13,422, 72 Fed. Reg. 2763 (Jan. 18, 2007).

109 Exec. Order No. 13,497, 74 Fed. Reg. 6113 (Jan. 30, 2009).

and Clinton each issued substantive “directives” to their agencies in memoranda spelling out instructions on regulatory matters ranging from HIV to education to water quality to food imports.<sup>110</sup>

President Obama continued this trend, issuing outright policy directives on some of the most significant regulatory policy matters of his time, including climate regulation<sup>111</sup> and perhaps net neutrality.<sup>112</sup> But one of his policy directives proved to be much more consequential in terms of giving rise to judicial review of the ramifications of presidential directives in the rulemaking process: his executive order on embryonic stem cell research.

During the presidency of his predecessor, George W. Bush, the issue of embryonic stem cell research sparked substantial controversy.<sup>113</sup> Bush’s policy reflected his effort not just to thread the needle of exceptionally difficult judgments of values, morals, and ethics, but also his effort to abide the limits of an annual appropriations rider, the Dickey-Wicker Amendment, which prohibits federal funds from being used for “research in which a human embryo or embryos are destroyed, discarded, or knowingly subjected to risk of injury or death greater than that allowed for research on fetuses *in utero*.”<sup>114</sup>

As a candidate for the presidency, then-Senator Obama criticized President Bush’s policy. Not long after his own inauguration, President Obama directed the U.S. Department of Health and Human Services (HHS) and the National Institutes of Health (NIH) to immediately change course on stem-cell research policy.<sup>115</sup> President Obama directed NIH to review existing gui-

110 Kagan, *supra* note 69, at 2294–95.

111 See, e.g., Barack Obama, *Presidential Memorandum—Power Sector Carbon Pollution Standards*, WHITE HOUSE (June 25, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards> (“To ensure continued progress in reducing harmful carbon pollution, I direct you to use your authority under sections 111(b) and 111(d) of the Clean Air Act to issue standards, regulations, or guidelines, as appropriate, that address carbon pollution from modified, reconstructed, and existing power plants and build on State efforts to move toward a cleaner power sector.”).

112 The record is much less clear as to whether President Obama actually directed FCC Commissioners to enact his preferred policy, or whether he simply created a political environment to which Commissioners were susceptible to influence. *In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, 5921 (2015) (Comm’r Pai, dissenting) (“So why is the FCC changing course? Why is the FCC turning its back on Internet freedom? Is it because we now have evidence that the Internet is not open? No. Is it because we have discovered some problem with our prior interpretation of the law? No. We are flip-flopping for one reason and one reason alone. President Obama told us to do so.”).

113 See generally ADAM BRIGGLE, *A RICH BIOETHICS: PUBLIC POLICY, BIOTECHNOLOGY, AND THE KASS COUNCIL* (2010) (discussing the controversial council on bioethics established by President Bush).

114 Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, § 509(a)(2), 123 Stat. 803 (emphasis added); see also Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007). For an account of President Bush’s decision, see *The Stem Cell Debates: Lessons for Science and Politics*, NEW ATLANTIS, Winter 2012, at 14–34.

115 Exec. Order No. 13,505, 74 Fed. Reg. 10,667 (Mar. 11, 2009).

dance on the funding of embryonic stem-cell research, and to “issue new NIH guidance on such research that is consistent with this order.”<sup>116</sup> And at the outset of his order, President Obama announced that “[t]he purpose of this order is,” *inter alia*, “to remove these limitations on scientific inquiry, to expand NIH support for the exploration of human stem cell research.”<sup>117</sup>

Pursuant to those orders, NIH and HHS issued new guidance, expanding funding for embryonic stem cell research.<sup>118</sup> In the course of those proceedings, commenters challenged the new policy of expanding funding for embryonic stem-cell research and urged the agencies to take the opposite course—to not expand stem-cell research, but instead to limit or end it.<sup>119</sup>

The agencies declined to respond to these comments, and the D.C. Circuit affirmed the agencies’ silence. While agencies are generally required under the APA to respond to comments,<sup>120</sup> the court explained, that duty is not absolute. And, the court held, that duty does not apply in cases where the agency is effectuating an otherwise lawful executive order: “Following these commenters’ lead would directly oppose the clear import of the Executive Order, which sought to remove limitations on [embryonic stem-cell research] and to expand NIH [funding] for stem-cell research,” the court observed, and “NIH may not simply disregard an Executive Order. To the contrary, as an agency under the direction of the executive branch, it must implement the President’s policy directives to the extent permitted by law.”<sup>121</sup>

In short, the agency was “[b]ound” to implement the President’s order.<sup>122</sup> And thus, because the agencies’ formulation of guidance was from the outset bound by the President’s directive to expand funding, any comments urging the opposite policy “simply did not address any factor relevant to implementing the Executive Order.”<sup>123</sup>

### III. WHEN EXECUTIVE ORDERS “TRUMP” THE AGENCY’S DUTY TO RESPOND TO COMMENTS

Was the D.C. Circuit correct? Does a President’s executive order directing an agency to pursue a policy “trump” the agency’s obligation under the courts’ APA precedents to vet a policy’s merits through the notice-and-

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116 *Id.* § 3.

117 *Id.* § 1.

118 *See* 74 Fed. Reg. 32,170 (July 7, 2009).

119 *See* Brief for Appellants at 45, *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) (No. 11-5241), 2012 WL 111650, at \*45 (“The 30,000 comments questioning the scientific and ethical merits of human embryonic stem-cell research were directly relevant to the issues before the agency.”).

120 *See, e.g.,* *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35–36 (D.C. Cir. 1977) (*per curiam*).

121 *Sherley*, 689 F.3d at 784.

122 *Id.* at 785.

123 *Id.*

comment process?<sup>2</sup> What is the proper relationship between executive orders and the APA?

While executive orders have long given rise to litigation, including litigation related to regulatory issues, the courts have had little to say about the *precise* relationship between executive orders and the APA.<sup>124</sup> And, as noted above, the APA's own legislative history is silent on the subject.<sup>125</sup> But when the issue is defined very carefully, the D.C. Circuit's approach in *Sherley* seems not only cogent but also consistent with the basic premises of the APA. Again, to answer this question carefully requires reiteration of some basic limits and parameters to the inquiry. A President's executive order is unlawful if it violates the Constitution.<sup>126</sup> A President's executive order is also unlawful if it violates a federal statute, so long as the federal statute is itself lawful.<sup>127</sup> Similarly, an agency's action is arbitrary and capricious, and thus unlawful, if it violates or ignores the statutory criteria established by Congress to guide it.<sup>128</sup> On the other hand, agencies retain broad discretion to select the criteria or tools that they will use to make a final decision as to how to exercise discretion within the broad limits set by Congress.<sup>129</sup>

So if a President issues an executive order pointing an agency in a particular policy direction, but the substance of his preferred policy violates the limits imposed by Congress's lawful statutes empowering that agency in the first place, then the executive order cannot stand.<sup>130</sup> Or if the President orders an agency to adopt a policy regardless of substantive criteria set by Congress in the statute empowering the agency, then the order cannot stand.<sup>131</sup> Indeed, those are the limits that the OLC highlighted and conceded in its original opinion supporting President Reagan's Executive Order 12291:

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124 See Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026 (2015); Steven Ostrow, Note, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659 (1987).

125 See *supra* note 68 and accompanying text.

126 See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 591–95 (2006).

127 See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); see also *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978) (“Of course, an executive order cannot supersede a statute.”).

128 See *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

129 See *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1603–07 (2014) (affirming the EPA's use of cost-benefit analysis to allocate pollution-reduction burdens among states, amid Congress's silence on the subject).

130 Cf. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (“Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do. To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design.” (citation omitted)).

131 Cf. *Whitman v. Am. Trucking Ass’n, Inc.*, 531 U.S. 457, 471 & n.4 (2001) (holding that the Clean Air Act bars the EPA from considering costs—even in secret—when setting National Ambient Air Quality Standards).

[I]t is clear that the President's exercise of supervisory powers must conform to legislation enacted by Congress. In issuing directives to govern the Executive Branch, the President may not, as a general proposition, require or permit agencies to transgress boundaries set by Congress.<sup>132</sup>

But when a President's order directs an agency to adopt a policy that fits within the broad limits of the substantive statute, must the agency still respond to rulemaking comments criticizing the President's policy choice? The correct answer seems to be the one given by the D.C. Circuit—namely, no. This reflects both the limited nature of the agencies' court-made duties to respond to comments, but also courts' appreciation of executive orders as genuinely binding legal commands.

#### A. *Agencies' Duty to Respond Is Limited and Lenient*

The APA does not expressly require agencies, in formulating a final rule, to respond to comments on the original notice of proposed rulemaking. Rather, that requirement is one that has been formulated by the courts in order to elaborate and give effectual meaning to the APA's broadly worded requirements: "Notice and comment rulemaking procedures obligate the [agency] to respond to all significant comments, for 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public.'"<sup>133</sup>

But as a court-made elaboration of the APA, an agency's duty to respond to comments is "not 'particularly demanding'"; it is governed by the arbitrary and capricious standard.<sup>134</sup> An agency need not reply to literally "every comment made";<sup>135</sup> rather, "[t]he failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'"<sup>136</sup>

#### B. *Executive Orders Are Binding Commands that May Have Collateral Consequences*

Those lenient standards defining agencies' duties to respond create the space not just for agency action, but also for agency action pursuant to a

132 Proposed Executive Order Entitled "Federal Regulation," 5 Op. O.L.C. 59, 61 (1981) (footnote omitted).

133 *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987) (per curiam) (quoting *Ala. Power Co. v. Costle*, 636 F.2d 323, 384 (D.C. Cir. 1979) (per curiam)).

134 *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 441 (D.C. Cir. 2012) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993)); *ACLU*, 823 F.2d at 1581.

135 *Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 215 (D.C. Cir. 2013).

136 *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)); see *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006); see also *City of Waukesha v. EPA*, 320 F.3d 228, 257–58 (D.C. Cir. 2003) (per curiam); cf. *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1368 (D.C. Cir. 1985) ("It would be a different matter if the President directed the agency, in the course of its inquiry, to disregard the statutory criteria controlling its actions.").



presidential directive. For as the D.C. Circuit observed in *Sherley*, if a President squarely ordered the agency to take action within the lawful limits of the statutes and Constitution, and if executive orders truly are binding as a matter of law, then the agencies genuinely do not have the power to disregard the order.<sup>137</sup> That is, if Alexander Hamilton was correct that executive officers, “to whose immediate management [domestic policies] are committed, ought to be considered as the assistants or deputies of the chief magistrate . . . and ought to be subject to his superintendence,”<sup>138</sup> then the officers truly are, in the D.C. Circuit’s words, “duty-bound to give effect to the policies embodied in the President’s direction, to the extent allowed by the law.”<sup>139</sup>

Critics of this position effectively challenge the authority of executive orders *as lawfully binding*. This is a distinction that the D.C. Circuit drew in *Allbaugh*, observing the substantive difference between executive orders—that is, presidential directives *requiring* an agency to adopt a position—and other executive communications simply *requesting* that an agency take action, or requiring an agency to adopt a position “[t]o the extent permitted by law.”<sup>140</sup> When the President *orders* action within the statutes’ lawful limits, there is “nothing arbitrary in the decision of the officials involved not to go their own separate ways in light of the President’s directive . . . . Within the range of choice allowed by statute, the President may direct his subordinates’ choices.”<sup>141</sup>

The Supreme Court has often recognized that executive orders are binding, supreme law so long as they comport with statutory and constitutional limits. A useful example can be found in *Old Dominion Branch No. 496*, where the Supreme Court held that labor disputes between federal employers and federal employees were controlled (at that time) by President Nixon’s Executive Order 11491.<sup>142</sup> The Court held that the executive order was “a reasonable exercise of the President’s responsibility for the efficient operation of the Executive Branch,” not inconsistent with statutes; accordingly, the Court further concluded, “we have no difficulty concluding that the Executive Order is valid and may create rights protected against inconsistent state laws through the Supremacy Clause.”<sup>143</sup>

Indeed, if executive orders are in fact legally binding, as suggested by the historical experience outlined at the outset of this Article, then agencies would lack any power or discretion to second guess the President’s judgment. Agencies are not obliged to respond to questions challenging the constitu-

137 *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012).

138 THE FEDERALIST NO. 72, at 365 (Alexander Hamilton) (Ian Shapiro ed., 2009).

139 *Bldg. & Constr. Trades Dep’t v. Allbaugh*, 295 F.3d 28, 32–33 (D.C. Cir. 2002); *see Sherley*, 689 F.3d at 784.

140 *Allbaugh*, 295 F.3d at 33 (internal quotation marks omitted).

141 *Nat’l Fed’n of Fed. Emps. v. Brown*, 645 F.2d 1017, 1022 (D.C. Cir. 1981) (footnote omitted).

142 *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273 (1974).

143 *Id.* at 273 n.5.

tionality of the statutes that mandate their action,<sup>144</sup> because they cannot resolve squarely presented constitutional issues.<sup>145</sup> If executive orders are superior law, just as statutes are superior law, then agencies cannot challenge their lawfulness in the course of a rulemaking.

But this does impose upon the agencies and courts a duty to discern whether an executive order genuinely is an executive *order*. As noted above, not all presidential instructions are *orders*. Indeed, not all executive orders are truly *orders*—some merely request that agencies take action.<sup>146</sup> Only once it is clear that the President has *ordered* an agency to take action can an agency be bound. And similarly, the agency and the court must be precise in defining precisely what the President has ordered. In *Sherley*, the agencies' and court's work was made easier by the fact that commenters were clearly challenging the President's order: he had ordered the agencies to increase stem cell research funding, while the commenters wanted the agencies to decrease or eliminate such funding.<sup>147</sup> Had the commenters merely asked the agency to increase funding only by a small amount, then the President's order would not have dictated the agency's outcome.

In that respect, *Sherley* seems to echo decisions by the Supreme Court and D.C. Circuit recognizing the ramifications of executive orders that substantively tie agencies' hands.

The most immediate analogy would be to the OIRA context itself. As noted above, the executive orders creating the centralized White House regulatory review process included not just procedural commands, but also substantive ones. And the D.C. Circuit long ago gave effect to those commands by treating them as binding. Not long after President Reagan issued Executive Order 12291, the D.C. Circuit affirmed an agency's decision to consider the economic costs of a new rule, precisely because "Executive Orders specifically *require* an agency to evaluate the economic impact of its regulations."<sup>148</sup> Years later, in the D.C. Circuit's seminal cost-benefit decision arising from the Occupational Safety and Health Administration's lockout/tagout rule, the court observed that the agency "ha[d] an existing obligation under [Executive Order 12291] to complete a cost-benefit analysis for each major rulemaking."<sup>149</sup>

Another analogous precedent is found in the context of the National Environmental Policy Act (NEPA). NEPA normally obliges an agency to con-

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144 See *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 62 (D.C. Cir. 2001) (quoting *Graceba Total Commc'ns, Inc. v. FCC*, 115 F.3d 1038, 1042 (D.C. Cir. 1997)).

145 See *Am. Coal. for Competitive Trade v. Clinton*, 128 F.3d 761, 766 & n.6 (D.C. Cir. 1997).

146 See, e.g., Exec. Order No. 13,579, 3 C.F.R. 256 (2011) (requesting that independent agencies review their regulations).

147 *Sherley v. Sebelius*, 689 F.3d 776, 779–80 (D.C. Cir. 2012).

148 *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1222 (D.C. Cir. 1983) (emphasis added) (footnote omitted) (citing Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (Mar. 24, 1978)).

149 *Int'l Union v. OSHA*, 938 F.2d 1310, 1321 (D.C. Cir. 1991) (citation omitted).

sider the environmental impacts of its actions, much like the APA (as elaborated by the courts) normally requires agencies to respond to comments.<sup>150</sup> But, the Supreme Court has held, in *Department of Transportation v. Public Citizen*, that when an agency implements a policy decision made by the President, it is not required to analyze the environmental impacts of the President's decision, because it has no control over the President.<sup>151</sup> In that case, the Court was considering the Federal Motor Carrier Safety Administration's actions implementing the President's decision to allow Mexican motor carriers to drive on U.S. highways.<sup>152</sup> Because the President made that decision (through a presidential memorandum published in the *Federal Register*),<sup>153</sup> the Court held that the agency was not obligated to justify the environmental impacts of that policy through the normal NEPA analysis requirement. After all, the Court observed:

It would not . . . satisfy NEPA's "rule of reason" to require an agency to prepare a full EIS due to the environmental impact of an action it could not refuse to perform. Put another way, the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion.<sup>154</sup>

In other words, the agency would not be held accountable for the President's action. The President's binding decision would recalibrate the agency's other procedural duties—not vice versa. This is the same basic premise and principle that the D.C. Circuit advanced in *Sherley*.

*C. Presidential Control Is the Premise of Modern Administrative Law's Most Significant Doctrine*

Finally, taking a step back from the specific issue of executive orders per se, one sees that the D.C. Circuit's approach in *Sherley* fits squarely with the tenor of the Supreme Court's efforts to place presidential power and accountability at the heart of administrative law through the *Chevron* doctrine.

In *Chevron*, the Court justified judicial deference to agencies' statutory interpretations primarily in terms of the *President's* political accountability. While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the government to make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be

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150 See, e.g., *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978) (describing the duties imposed by NEPA).

151 See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 765–70 (2004).

152 *Id.* at 756.

153 67 Fed. Reg. 71,795 (Dec. 2, 2002).

154 *Pub. Citizen*, 541 U.S. at 769.

resolved by the agency charged with the administration of the statute in light of everyday realities.<sup>155</sup>

While agreeing that ultimately the *agency* resolves the policy issue through regulatory actions, *Chevron's* focus on the *President* as the locus of responsibility for everyday regulatory decisions would imply that the President ultimately controls agency action; the Court did not seem to imply that *Chevron* was premised upon Presidents commonly firing or threatening to fire executive officers in order to align the agencies with their views.

The Court returned to this premise in later cases reaffirming the broad scope of *Chevron*. In *City of Arlington*, Justice Scalia's majority opinion stressed in a footnote that rulemakings "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power,'" which is vested in the President alone.<sup>156</sup> Similarly, in *Brand X*, the Court stressed that "the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency,"<sup>157</sup> in order to preserve the agency's ability to "consider varying interpretations and the wisdom of its policy on a continuing basis' . . . in response to changed factual circumstances, or a change in administrations."<sup>158</sup>

On this latter point, the Court in *Brand X* invoked then-Justice Rehnquist's separate opinion in *State Farm*, where he stressed that the President's policy views can be a paramount consideration:

The agency's changed view of the standard seems to be related to the election of a new President of a different political party. . . . A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations. As long as the agency remains within the bounds established by Congress, it is entitled to assess administrative records and evaluate priorities in light of the philosophy of the administration.<sup>159</sup>

Which is to say, the philosophy of the President.<sup>160</sup>

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155 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

156 *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013) (citing U.S. CONST. art. II, § 1, cl. 1).

157 *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks omitted) (quoting *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 742 (1996)).

158 *Id.* (emphasis added) (quoting *Chevron*, 467 U.S. at 863–64).

159 *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) (footnote omitted).

160 Then-Justice Rehnquist was not alone in recognizing the importance of presidential power, and presidential accountability through elections, as a fundamental premise of modern administrative law. Other Justices have reiterated the importance of presidential control of at least executive agencies in formulating administration policy. Justice Stevens's dissent in *Fox*, where he attempts to distinguish independent agencies from executive agencies, expressly *presumes* that executive agencies are simply "an arm or an eye of the executive," and that executive agencies' policies are "subject to change at the President's will." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 540 (2009) (Stevens, J., dissenting)

*Chevron* deference exemplifies modern administrative law's appreciation of the President's central role, power, and responsibility in the context of administrative policymaking. Indeed, much (but not all) of *Chevron's* legitimacy is premised upon the President's power over the agencies, which are in turn treated as Chief Justice Taft saw them in *Myers*:

The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion . . . .

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will.<sup>161</sup>

The D.C. Circuit's approach in *Sherley* echoes that fundamental premise of presidential control and accountability, in the context of agency policymaking through rulemaking.<sup>162</sup>

#### IV. HIGHER TRANSPARENCY: REDIRECTING ACCOUNTABILITY TO THE PRESIDENT HIMSELF

Again, none of the foregoing is intended to suggest that the agency is not obligated to at least explain why it is bound by the order, just as it must explain why a statute dictates its outcome. And this, in turn, directs public scrutiny to where it properly belongs: to the President himself.

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(internal quotation marks omitted) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935)). In that same case, Justice Breyer's similar efforts to contrast the independent FCC with executive agencies conceded that the latter may much more legitimately base their actions on "purely political reasons" or "unexplained policy preferences," because executive agencies, unlike independent agencies, are "directly responsible to the [people]." *Id.* at 547 (Breyer, J., dissenting). More recently, the D.C. Circuit's Chief Judge Merrick Garland acknowledged then-Justice Rehnquist's point, quoting his *State Farm* point at length in an opinion affirming a significant change in environmental policy brought about by "the inauguration of a new President and the confirmation of a new EPA Administrator." *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012).

161 *Myers v. United States*, 272 U.S. 52, 132–34 (1926) (citations omitted).

162 Of course, by focusing on policymaking through rulemaking, this Article sidesteps complications presented by other aspects of the rulemaking process. For example, would a President's directives regarding *factual* findings, rather than policy discretion, be entitled to the same judicial deference? Likely not, for the reasons highlighted by *State Farm* itself, which struck down an agency's action repealing a prior airbag regulation without addressing its prior factual findings. See *Fox*, 556 U.S. at 515 (holding that an agency's change in regulation may be subject to heightened scrutiny if "its new policy rests upon factual findings that contradict those which underlay its prior policy"); see also *id.* at 538 (Kennedy, J., concurring in part and concurring in the judgment). Or, to step beyond the rulemaking context, could a President use an executive order to dictate a policy in the context of an agency adjudication? Even Chief Justice Taft, in *Myers*, expressed doubts. See *Myers*, 272 U.S. at 135 ("[T]here may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control.").

To the extent that affected parties seek to challenge the lawfulness of the President's order, judicial review can be found, if at all, in direct judicial review of the order itself. This route presents challenges—especially jurisdictional ones—but it has the salutary effect of promoting *transparency*, because it traces accountability for the President's actions to the President himself. And thus the D.C. Circuit's approach in *Sherley* epitomizes the Hamiltonian presidency, an office that for the sake of good government must be both energetic and accountable.<sup>163</sup>

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163 See THE FEDERALIST NO. 70 (Alexander Hamilton).

