WILLIAM & MARY
LAW SCHOOL

PRESIDENTIAL LAWS AND THE MISSING INTERPRETIVE THEORY

Tara Leigh Grove

William & Mary Law School

William & Mary Law School Research Paper No. 09-390
168 U. PA. LAW REVIEW (forthcoming 2020)

PRESIDENTIAL LAWS AND THE MISSING INTERPRETIVE THEORY

Tara Leigh Grove*

(forthcoming 168 U. PA. L. REV. __ (2020))

ABSTRACT

There is something missing in interpretive theory. Recent controversies—involving, for example, the first travel ban and funding for sanctuary cities—demonstrate that presidential "laws" (executive orders, proclamations, and other directives) raise important questions of meaning. Yet, while there is a rich literature on statutory interpretation and a growing one on regulatory interpretation, there is no theory about how to discern the meaning of presidential directives. Courts, for their part, have repeatedly assumed that presidential directives should be treated just like statutes. But that cannot be right: Theories of interpretation depend on both constitutional law and institutional setting. For statutes, the relevant law comes from Article I and the procedures governing Congress. For presidential directives, the starting point must be Article II. This Article contends that Article II and the distinct institutional setting of the presidency point toward textualism. Article II, particularly the Opinions Clause, gives the President considerable power to structure the process by which he issues directives. Drawing on various sources—including the author's interviews with officials from the Trump, Obama, and other administrations—this Article offers a window into that process. Since at least the 1930s, presidents have invited agency officials to draft, negotiate over, and redraft presidential directives. The final directive signed by the President may not reflect his ideal position; instead, presidents often issue compromise directives that reflect their subordinates' recommendations. This Article argues that courts respect that structure, and hold presidents accountable for any mistakes, by adhering closely to the text. Thus, whatever one thinks about honoring the textual compromises that come from Congress, there are independent and important reasons to hew strictly to the text that comes from the White House. Notably, this analysis has important implications not only for interpretive theory but also for broader questions about the constitutional separation of powers. In an era of ever-expanding presidential power, presidents have at times (and surprisingly) allowed themselves to be constrained by their own administration.

---

* Professor of Law, William and Mary Law School. I am grateful to Jack Beermann, Evan Bernick, Aaron Bruhl, Neal Devins, David Fontana, Jack Goldsmith, David Landau, Alli Larsen, Gillian Metzger, Henry Monaghan, Michael Morley, Victoria Nourse, Jim Pfander, Daphna Renan, Shalev Roisman, Mark Seidenfeld, Kate Shaw, and Kevin Stack for helpful discussions or comments on earlier drafts. I thank Jonathan Barsky, Andrew Lowy, Shannon Murphy, and Alec Young for excellent research assistance. This paper was presented at the University of Florida Levin College of Law and will be presented at the Constitutional Law Colloquium at the Georgetown University Law Center, and at the first annual National Conference of Constitutional Law Scholars in Tucson, Arizona.

PRESIDENTIAL LAWS AND THE MISSING INTERPRETIVE THEORY

I. INTRODUCTION

There is something missing in interpretive theory. Scholars have offered a rich literature on statutory interpretation and a growing one on regulatory interpretation. But what about the "laws" issued by the President himself—that is, the cadre of executive orders, proclamations, memoranda, and other directives? To be sure, commentators recognize that courts may examine the validity of such directives—that is, whether the President exceeded either statutory or constitutional authority.[1] But recent controversies—involving the first travel ban and funding for sanctuary cities—demonstrate that presidential directives raise not only questions of validity but also questions of meaning.[2] Yet Justice Antonin Scalia and Bryan Garner's treatise *Reading Law*—which purports to address all "legal texts" and discusses cases involving the U.S. Constitution, federal statutes, state statutes, and private contracts—does not so much as mention presidential directives.[3] And although some commentary has recognized that courts must interpret such documents, none has offered a comprehensive interpretive theory.[4]

The federal judiciary, for its part, has regularly grappled with the meaning of presidential directives for well over a century. Courts have employed a variety of interpretive methods. But significantly, these (otherwise disparate) decisions have repeatedly reaffirmed a common assumption: presidential directives should be treated just like statutes.[5]

---

[1] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). For scholarship exploring the question of statutory authorization for presidential directives, see Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 545 (2005) (directives "must be traceable to some identifiable" statute); *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2, 64, 68 (2002); Joel L. Fleishman & Arthur H. Aufses, *Law and Orders*, 40 LAW & CONTEMP. PROBS 1, 5-6, 19-25 (1976) (some orders rest on doubtful statutory authority). For a recent analysis of how a litigant might challenge a presidential directive as violating the Constitution or a federal statute, see Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI L. REV. __ (2019).

[2] *See* Part IV(A).

[3] *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

[4] *See* Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2034-37 (2015) (offering an empirical survey of cases in the D.C. Circuit and Supreme Court); John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837 (1981) (surveying cases on private rights of action); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. __(2019) (surveying the use of "intent" in constitutional law and other areas, and suggesting presidential intent may be relevant to constitutional law and statutory interpretation but, on functional grounds, courts should be wary of relying on intent to interpret presidential directives); *see also* J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1739 n.42 (2018) ("Legal scholars have, for the most part, not focused on presidential direct actions").

[5] *See* Part II; *see also, e.g.*, Ex parte Mitsuye Endo, 323 U.S. 283, 298 (1944) ("We approach the construction of [an executive order] as we would approach the construction of legislation in this field."); De Kay v. United States, 280 F. 465, 472-73 (1st. Cir. 1922)

This Article challenges that assumption. The argument builds on two (related) premises. First, as many scholars have recognized, much of interpretive theory is, at bottom, a theory of constitutional law.[6] The law that governs statutory interpretation necessarily derives from the constitutional provisions that empower and constrain Congress—principally, Article I. Accordingly, in the statutory interpretation literature, scholars debate the implications of the bicameralism and presentment requirements of Article I, Section 7, and the Rules of Proceedings Clause of Article I, Section 5.[7] By contrast, any theory of interpreting presidential directives must build on the law that governs the President—primarily, Article II.

Second, interpretive theory must also pay close attention to institutional setting. Congress is governed not only by the rules laid out in the Constitution but also by the internal rules and procedures that the House of Representatives and the Senate have crafted (pursuant to their Article I, Section 5 authority). Thus, statutory scholars debate whether, and the extent to which, courts should credit lawmakers' heavy reliance on legislative history. This debate suggests that the interpretation of presidential directives should also be attentive to the institutional setting and procedures of the executive branch. Notably, the process through which presidential directives are issued is not set forth in the Constitution or any federal statute, nor is it widely known in the legal literature. Accordingly, this Article offers readers a window into that process—drawing on both political science research and the author's own interviews with key players from the Trump, Obama, George W. Bush, and other past administrations.[8]

("In construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes"); United States v. Abu Marzook, 412 F.Supp.2d 913, 922 (N.D. Ill. 2006) ("The Court interprets Executive Orders in the same manner that it interprets statutes").

[6] *See, e.g.*, Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law."); John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999) (emphasizing the importance of "structural constitutional analysis" to interpretive theory); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1122 (2011); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593-94 (1995); *cf.* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017). The focus on constitutional theory is, of course, not universal. *See infra* note 61.

[7] U.S. CONST. art. I, § 7; U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings[.]"); Part II(B)(2).

[8] Naturally, none of the individuals interviewed necessarily accept this Article's assertions. *See* Part III(B); Interview with John Bies, Deputy Ass't Atty Gen., Office of Legal Counsel, Obama Admin. (May 2, 2018); Interview with Paul Clement, Solicitor Gen., George W. Bush Admin. (May 3, 2018); Interview with Raj De, Staff Secretary, Obama Admin. (May 16, 2018); Interview with Brian Egan, Legal Adv. at Dept of State and Dep. White House Counsel for Nat'l Sec. and Ass't Gen. Counsel, Dept of Treas., Obama Admin. (May 24, 2018); Interview with Chris Fonzone, Dep. Ass't and Dep.

This Article argues that Article II and the distinct institutional setting of the presidency point toward textualism. To be sure, one might assume that because the President is a unitary actor, courts should look to presidential intent. But such an approach would disregard the complex process that presidents have created pursuant to their Article II authority for presidential lawmaking. Article II, particularly the Opinions Clause, grants the President considerable discretion to structure the process for issuing directives. Since at least the 1930s, presidents have used that power to invite agency officials to draft, negotiate over, and redraft directives. Notably, the resulting text signed by the President may not reflect his preferred substantive policy. After the interagency consultation process, presidents often opt to "split[] the difference" among agencies.[9] Alternatively, after a more truncated process, the President may issue a directive that turns out (in hindsight) to have been ill-considered. Article II gives the President the power to make—and holds him accountable for—an informed or ill-informed decision. I argue that courts can best give effect to the structure the President has created—with its potential for compromise and less-than-effective policy—by adhering to the text.

This analysis has important implications for both legal scholarship and recent litigation. First, this Article offers something that has been missing in interpretive theory: an approach for presidential instruments. The Article contends that courts should hew closely to the text of a directive, even when the text may not fit what the court believes to have been the President's primary goal. Second, this Article shows that after agency review, a President may well issue a compromise or even toothless directive. This issue is of great importance in recent litigation over funding for sanctuary cities; the President's directive seems to be so watered down as to be legally ineffective at defunding those jurisdictions.[10] This textualist approach also offers a theoretical justification for why—despite the federal government's assertions in defending the first travel ban—courts should not credit a memo from a White House official "clarifying" a presidential directive.[11] Article II concentrates accountability in the President himself.

Even for those who are not convinced by the textualist method advocated here, this Article should at a minimum provide a roadmap for future work on interpreting presidential directives. Although scholars

---

Counsel to President and Legal Adv. to Nat'l Sec. Council, Obama Admin. (May 22, 2018); Interview with C. Boyden Gray, White House Counsel, George H.W. Bush Admin., and Counsel to Vice Pres. George H.W. Bush, Reagan Admin. (June 27, 2018); Interview with Michael Luttig, Ass't Atty Gen., Office of Legal Counsel, George H.W. Bush Admin. (July 16, 2018); Interview with Don McGahn, White House Counsel, Trump Admin. (March 23, 2018 & Nov. 19, 2018), Interview with Lee Otis, Assoc. White House Counsel, George H.W. Bush Admin. (June 6, 2018).

[9] *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 63-64 (2001); *infra* Part III(B).

[10] *See infra* Part IV(B)(2).

[11] *See infra* Part IV(B)(1).

strongly dispute the proper approach to statutory interpretation, most do seem to agree that interpretive theory must be guided by what this Article has called constitutional and institutional concerns. As this Article asserts, for presidential directives, the starting point must be Article II, not Article I. Moreover, this Article's emphasis on institutional setting links up with what might be called the emerging field of "*non*statutory interpretation"—recent work on interpreting regulations,[12] popular initiatives,[13] and the federal rules of civil procedure.[14]

Finally, this Article has implications for broader theories of constitutional law and presidential power. The Article shows that for nearly a century, presidents have (surprisingly) *sought out* advice from, and often agreed to the recommendations of, their subordinates, even when issuing seemingly unilateral directives. That is, presidential directives are less "unilateral" than one might have thought. The Article thus contributes to the literature on the "internal separation of powers" within the executive branch—the idea that the bureaucracy itself may serve (at times) to constrain presidential power.[15]

At the outset, I offer a few points of clarification. First, "textualism" is not self-defining.[16] This Article uses the term to mean that judges must abide by the public meaning of the text of a directive, understood in context. The relevant context encompasses, at a minimum, the text and structure of the directive at issue, other directives issued by the same administration (and likely those from past administrations), as well as linguistic conventions from legal terms of art, dictionaries, and colloquial speech.

Second, this Article does not aim to resolve questions about specific canons of interpretation. It is arguable that some statutory canons may not properly carry over to the context of presidential directives, or that this arena calls for adjustments or even different canons.[17] Although this Article does not address those issues, the framework offered here—a

---

[12] *See* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 360-61 (2012) (advocating "a purposive method"); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 84 (2015); Lars Noah, *Divining Regulatory Intent*, 51 HASTINGS L.J. 255, 260 (2000).

[13] *See* Jane S. Schacter, *The Pursuit of 'Popular Intent': Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 111 (1995).

[14] *See* Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 Minn. L. Rev. 2167, 2168 (2017).

[15] Neal K. Katyal, *Toward Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2318 (2006); *see* Part V.

[16] John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

[17] For example, Justice Scalia and Bryan Garner argued that the "venerable principle that ambiguity should be resolved against the party responsible for drafting the document…does not apply to governmental directives." SCALIA & GARNER, *supra* note 3, at 42. That may be sensible for statutes, but less so for presidential directives—at least when they impact government contractors or employees. *See* Cole v. Young, 351 U.S. 536, 556 (1956) (suggesting "[a]ny ambiguities" in an executive order that required the termination of disloyal employees "should…be resolved against the Government").

focus on Article II and the institutional setting of the executive branch—should inform future work.

The analysis proceeds as follows. Part II lays important groundwork, describing presidential directives and the tendency of courts to treat directives as statutes. The Part argues that courts have largely overlooked the very different institutional context of Congress and the presidency. Parts III and IV offer an Article II-based theory of interpreting presidential directives, arguing that the constitutional structure and the distinct institutional setting of the executive branch point toward textualism. Finally, Part V suggests that the process for issuing presidential directives points toward some (perhaps unexpected) constraints on presidential power.

II. PRESIDENTIAL DIRECTIVES IN COURT: A LACK OF THEORY

Presidential directives have received surprisingly little attention in the legal academic literature. Accordingly, to frame the discussion, this Part provides some needed background. The Part then moves to the central point: Federal courts have repeatedly assumed—without analysis—that presidential directives should be interpreted like statutes. This Article contends, however, that a theory for presidential directives must rest on Article II, not Article I.

A. Definition and Brief Historical Background

Presidents today issue a variety of directives—labeled as "executive orders," "proclamations," "memoranda," or simply "directives."[18] Although some early commentary sought to make sharp distinctions among these documents,[19] more recent commentators have recognized that presidents often use these devices interchangeably.[20] President Trump's recent directives illustrate this point. The first two versions of the travel ban were "executive orders,"[21] while the third was a "proclamation."[22]

---

[18] *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 209 (2d ed. 2014); Stack, *supra* note 1, at 546-47.

[19] House Comm. on Gov't Op., 85th Cong., 1st Sess., Exec. Orders and Proclamations: A Study of a Use of Pres. Powers 1 (Comm. Print 1957) (suggesting executive orders are "directed to" executive officials, while proclamations are aimed at private conduct).

[20] *See, e.g.*, GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS (2013) (government officials treat executive orders and proclamations "as being very similar, if not interchangeable"); *see also* Legal Effect of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000) ("there is no substantive difference" among directives).

[21] *See* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017); Exec. Order 13780, 82 Fed. Reg. 13209 (March 6, 2017).

[22] *See* Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, Procl. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).

As discussed below (in Part III), the label does affect, to some degree, the *procedure* through which the directive is created or revised.[23] But a President may seek to fulfill the same policy through an executive order, proclamation, memorandum, or other device. Accordingly, at the outset, this Article defines a presidential directive broadly as any directive that requires, authorizes, or prohibits some action by executive officials.[24]

Notably, these directives have a lengthy historical pedigree. Presidents have issued pronouncements to their subordinates since the days of George Washington.[25] But while those early directives did at times wind up in court, most nineteenth-century litigation dealt with the validity of the presidential directive at issue (that is, whether it was consistent with the Constitution or a federal statute).[26] Questions of meaning were, at best, in the background.

My research suggests that the federal judiciary dealt more regularly with cases involving the meaning of presidential directives beginning in the early twentieth century.[27] That is likely because the number of directives skyrocketed around that time, starting with the presidency of Theodore Roosevelt.[28] As political scientists have reported, Roosevelt issued almost as many directives as all of his predecessors combined.[29] The rise in litigation may also reflect the increasing significance of these directives.[30] Presidents began to make policy on

---

[23] The Office of Management and Budget oversees the creation of an executive order or proclamation, while other White House sections handle other documents. *See* Part III(B).

[24] *Accord* MAYER, *supra* note 9, at 4 ("Executive orders are…presidential directives that require or authorize some action within the executive branch"); *supra* note 20.

[25] *See* DODDS, *supra* note 20, at 90-119 (providing a historical survey of early presidential directives, including the Neutrality Proclamation and the Emancipation Proclamation).

[26] *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (concluding that President Washington exceeded his statutory authority by ordering the seizure of vessels). *See also* DODDS, *supra* note 20, at 54-85 (discussing nineteenth-century judicial decisions, which focused on the validity of the directive at issue); *infra* note 27 (discussing my research).

[27] With the help of research assistants, I conducted Westlaw searches and looked at hundreds of cases. It was clear that the bulk of disputes over meaning arose beginning in the early twentieth century. The search terms included: adv: TE("executive order" /s interp! or constru! or mean!); adv: TE("president! proclam!" /s interp! or constru! or mean!); adv: TE("president! memorand!" /s interp! or constru! or mean!).

[28] *See* DODDS, *supra* note 20, at 87, 121, 152-94. The greatest spike was during the 1930s and 1940s—the time of the Great Depression and World War II. *See id.* at 162 (Franklin Roosevelt issued 3522 executive orders, "far more than any president before or since"). Presidents today still issue significant directives at a high rate. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 83 (2003) (reporting, based on an empirical study, that the number of significant directives increased beginning in the mid-twentieth century).

[29] *See* DODDS, *supra* note 20, at 87, 121 (Theodore Roosevelt issued 1081 orders, while his predecessors had together issued a total of 1262).

[30] *See* Alexander Bolton & Sharece Thrower, *Legislative Capacity and Executive Unilateralism*, 60 AM. J. POL. SCI. 649, 656 (2015) (nineteenth-century orders tended to be more ceremonial and less substantively broad"); *supra* note 28 (noting the rise in significant orders).

matters ranging from labor disputes, conservation,[31] and civil rights[32] to national security[33] and war.[34]

B. Presidential Directives as Statutes?

Over the past century, the federal judiciary has grappled with various interpretive questions surrounding presidential directives. The questions of meaning include, for example, what qualifies as an environmental "emergency";[35] which arrangements count as "government contracts";[36] whether a directive creates a private right of action;[37] whether a directive authorizes "back pay" in government-initiated actions,[38] and the meaning of terms like "banking institution,"[39] "transfer,"[40] and even "infant."[41] Courts have employed a variety of methods to interpret these directives. But one common theme emerges: federal courts have

---

[31] *See* DODDS, *supra* note 20, at 122, 124-51.

[32] *See* Exec. Order No. 11375(3), 32 Fed. Reg. 14303, 14304 (Oct. 13, 1967); Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319, 12320 (Sept. 24, 1965) (together, barring discrimination and requiring affirmative action on the basis of "race, color, religion, sex, or national origin"); *see also* Exec. Order No. 10925, § 301, 26 Fed. Reg. 1977, 1977 (March 6, 1961); RUTH P. MORGAN, THE PRESIDENT AND CIVIL RIGHTS: POLICYMAKING BY EXECUTIVE ORDER 46-50 (1970).

[33] *See* Part II(B)(1)(b) (discussing orders issued under the International Emergency Economic Powers Act).

[34] *See*, e.g., Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the exclusion of "any person" from designated "military areas"); *infra* note 243.

[35] *See* APWU v. Potter, 343 F.3d 619, 621, 624-27 (2d Cir. 2003) (interpreting Exec. Order No. 12580, § 2(e)(1), 52 Fed. Reg. 2923, 2924 (Jan. 23, 1987), which authorizes Environmental Protection Agency to handle "emergency removal actions" and permits other agencies to handle "removal actions other than emergencies" under CERCLA).

[36] *See* Crown Cent. Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 746-48, 749 (D. Md. 1976) (holding that leases for oil and gas rights qualified as "government contracts" within the meaning of Exec. Order No. 11246, §201, 30 Fed. Reg. 12319, 12319 (Sept. 24, 1965), which prohibits discrimination and mandates affirmative action by government contractors); *see also* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 463-70 (5th Cir. 1977) (concluding that a public utility qualified as a "government contractor" for purposes of Executive Order 11246), *vacated on other grounds by* 436 U.S. 942 (1978).

[37] Most courts have found that presidential directives do not create private rights of action. *See* Helicopter Ass'n Intern., Inc. v. FAA, 722 F.3d 430, 439 (D.C. Cir. 2013); Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1281, 1284-86 (9th Cir. 1987); Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 235-36 (8th Cir. 1975); Farkas v. Texas Instr., Inc., 375 F.2d 629, 631-33 (5th Cir. 1967).

[38] *See* United States v. Duquesne Light Co., 423 F. Supp. 507, 508-10 (W.D. Pa. 1976) (holding Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), implicitly authorized back pay).

[39] *See* Propper v. Clark, 337 U.S. 472, 474-76, 480-82 (1949) (holding that an association of musical composers was a "banking institution" under the definition in Exec. Order 8785, 6 Fed. Reg. 2897 (June 14, 1941)).

[40] *See* Zittman v. McGrath, 341 U.S. 446, 447-50 (1951) (an attachment levy was not a "transfer" within the meaning of Exec. Order 8785, 6 Fed. Reg. 2897 (Jun 17, 1941)).

[41] *See* United States v. Best & Co., 86 F.2d 23, 23-28 (C.C.P.A. 1936) (a presidential proclamation, which placed an extra import duty on "infants' outerwear" applied to wool knit sweaters that were designed for children between the ages of two and six).

repeatedly asserted that presidential directives should be treated just like statutes.[42]

An early case vividly illustrates this assumption. One of the most notable decisions in interpretive history is *Holy Trinity Church v. United States*, where the Supreme Court advised that the "spirit" should prevail over the "letter" of a statute.[43] A federal court of appeals in *De Kay v. United States* extended this rationale to presidential directives.[44]

The *De Kay* case arose out of a rather unusual set of circumstances. A 1916 Supreme Court ruling (known as the "Killits decision") declared that federal courts lacked a common law power to suspend criminal

---

[42] *See, e.g.*, Ex parte Mitsuye Endo, 323 U.S. 283, 298 (1944) ("We approach the construction of [an executive order] as we would approach the construction of legislation in this field."); De Kay v. United States, 280 F. 465, 472-73 (1st. Cir. 1922) ("In construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes"); Singh v. Gantner, 503 F.Supp.2d 592, 595-96 (E.D.N.Y. 2007) ("In the construction and interpretation of a statute or an Executive Order, accepted canons of statutory construction must be applied"); United States v. Abu Marzook, 412 F.Supp.2d 913, 922 (N.D. Ill. 2006) ("The Court interprets Executive Orders in the same manner that it interprets statutes"); *see also* Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1281, 1284-86 (9th Cir. 1987) (applying the *Cort v. Ash*, 422 U.S. 66 (1975), test for statutes, as well as "elemental canon[s] of statutory construction" in concluding that an executive order did not create an implied private right of action); Utah Ass'n of Counties v. Bush, 316 F. Supp. 2d 1172, 1199 (D. Utah 2004) ("'The test used to determine whether a statute has been repealed is also used for an executive order.'" (quoting Mille Lacs Band of Chippewa Indians v. Minn., 861 F.Supp. 784, 829 (D. Minn.1994)). Relatedly, lower federal courts have assumed that the same severability rules apply to statutes and presidential directives. *See* Mille Lacs Band of Chippewa Indians v. State of Minn., 124 F.3d 904, 917 (8th Cir. 1997) ("The test for whether a valid portion of an otherwise unconstitutional statute can be severed also applies to executive orders."); In re Reyes, 910 F.2d 611, 613 (9th Cir. 1990) (applying the statutory standard to an executive order); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191-95 (1999) (assuming, without deciding, that "the severability standard for statutes also applies to Executive Orders"). I found only two decisions that clearly questioned the assumption that presidential directives should be treated like statutes. In the first, the court recognized that its own precedents treated executive orders like statutes and followed suit. *See* City and County of San Francisco v. Trump, 897 F.3d 1225, 1238 (9th Cir. 2018). In the second, the court was primarily concerned with the validity of the executive order at issue. See Am. Fed. of Gov't Employees, AFL-CIO v. Reagan, 665 F. Supp. 31, 34 (D.D.C. July 10, 1987) ("there are no established principles of interpretation for Executive Orders"), *rev'd on other grounds by* American Federation of Government Employees, AFL-CIO v. Reagan, 870 F.2d 723, 724 (D.C. Cir. 1989) (upholding the executive order and not commenting on any interpretive questions). Both decisions did, at least, acknowledge the need for interpretive principles in this area.

[43] 143 U.S. 457, 459 (1892) ("It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."). In that case, the Court held that the Alien Contract Labor Act of 1885, which by its terms barred "labor or service of any kind" by "any foreigner, applied only to "cheap, unskilled labor"; thus, the Holy Trinity Church could retain the services of an English pastor. 143 U.S. at 457-58, 459-65, 472 ("the intent of congress was simply to stay the influx of…cheap, unskilled labor.").

[44] De Kay v. United States, 280 F. 465 (1st. Cir. 1922).

sentences.[45] The Killits decision created quite a stir: Lower federal courts had suspended sentences for decades; an estimated 2000 individuals had benefited from such grace.[46] Would those people now have to be resentenced and possibly sent to jail? The Supreme Court anticipated these concerns, suggesting in its decision that a "complete remedy may be afforded by the exertion of the pardoning power."[47]

President Woodrow Wilson soon responded, issuing a proclamation that granted what some described as an "unprecedented… blanket pardon."[48] Wilson "grant[ed] a full amnesty and pardon to all persons under suspended sentences of United States courts…*and to all persons, defendants in said courts*, in cases where pleas of guilty were entered or verdicts of guilty returned prior to June 15, 1916, and *in which no sentences have been imposed*."[49]

Meanwhile, in April 1915, Henry De Kay and an associate were convicted of bank fraud.[50] De Kay was still in the process of challenging his conviction—and had not yet been sentenced—when President Wilson issued the "blanket pardon."[51] De Kay argued that the clemency extended to his case.[52] After all, the proclamation expressly applied "to all persons, defendants in [United States] courts, in cases where…verdicts of guilty [were] returned prior to June 15, 1916, and in which no sentences have been imposed." De Kay was not sentenced until February 2020.[53]

The court of appeals announced that "[i]n construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes."[54] "Applying the same rule of construction as was applied in *Church of the Holy Trinity*," the court held that, although De Kay's case "'may be within the letter of the statute,' it is 'not within its spirit.'"[55] The proclamation was stated "in general terms" but "must be restricted to the defendants" it was meant to benefit: those

---

[45] *See* Ex parte United States, 242 U.S. 27, 42, 51-53 (1916). The case was associated with Judge Milton Killits, whose decision was subject to mandamus review. *See* Ernest Morris & Province M. Pogue, *Some Phases of the Pardoning Power*, 12 A.B.A. J. 183, 185 (1926).

[46] *See* Charles L. Chute, *A Probation System in the United States Courts*, 11 VA. L. REG. 18, 19 (1925) ("Previous to this decision, a great many Federal judges had suspended sentence[s].").

[47] Ex parte United States, 242 U.S. 27, 52 (1916).

[48] Chute, *supra* note 46, at 19 ("President Wilson did the unprecedented thing of issuing a blanket pardon to these men and women. Had he not done so, all…would have had to be returned to court for sentenc[ing].").

[49] Proclamation: Amnesty and Pardon, *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8317-18 (June 14, 1917) (emphasis added).

[50] De Kay v. United States, 280 F. 465, 465-66, 471 (1st. Cir. 1922).

[51] *See id.* at 471.

[52] *See id.* at 465-66, 471-72.

[53] *See id.* at 472 (on February 6, 1920, De Kay was sentenced to five-year prison term).

[54] *Id.*

[55] *Id.* at 473 (quoting 143 U.S. 457, 459 (1892)).

"whose sentences had been illegally suspended."[56] In short, De Kay was out of luck.[57]

In subsequent years, courts continued to assume that presidential directives should be treated like statutes.[58] To be sure, this assumption does not resolve interpretive disputes. Although the Supreme Court has moved away from *Holy Trinity*, the Court has not adopted a single method of statutory interpretation, much less sought to make that approach precedential.[59] The approach to statutes is even more "eclectic" in the lower federal courts, which hear the bulk of interpretive questions surrounding presidential directives.[60] But I argue that this assumption presents not only a practical but also a theoretical challenge. To the extent one believes that constitutional theory and institutional considerations should inform interpretive method (as many scholars do), presidential directives should be treated as distinct instruments. In short, presidential directives are not statutes.

C. The Relevance of Structure and Institutional Setting: Lessons from Statutory Debates

As Jerry Mashaw and others have observed, "[a]ny theory of statutory interpretation is at base a theory about constitutional law."[61] In debates over statutory interpretation, scholars focus (appropriately enough) on the constitutional provisions governing Congress—primarily

---

[56] *Id*.

[57] *See id.* at 473-74.

[58] *See supra* note 42 (collecting cases).

[59] *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L.J. 1750, 1757-78 (2010) ("Methodological stare decisis…is generally absent from federal statutory interpretation"). Although the Court pays more attention to the text than it did in the past, the Court has not formally adopted "textualism." *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113.

[60] As scholars have demonstrated through meticulous empirical studies, lower courts do not have "a single approach" to statutory interpretation but rather display "intentional eclecticism." Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1300-01, 1353 (2018); *see* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 66 (2018). My research suggests that judges today approach presidential directives with a similar degree of "eclecticism."

[61] Mashaw, *supra* note 6, at 1686; *see* sources cited *supra* note 6; *see also* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 133 (2011) ("[Lawyers interpreting statutes] must decide...what division of political authority among different branches of government and civil society is best, all things considered."). Notably, not all theorists agree with this point. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 909 (2003) ("The Constitution cannot plausibly be read to say a great deal about…statutory interpretation"). Adrian Vermeule has advocated a version of textualism based primarily on concerns about the (limited) institutional capacities of the federal judiciary. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 4-5, 150, 181, 186-87 (2006).

Article I.[62] Statutory theorists are also attentive to the subconstitutional rules and procedures governing Congress (like committee hearings and the Senate filibuster). We can see this point vividly in recent debates over textualism and the use of legislative history. Significantly, these debates reflect an important (if at times implicit) assumption underlying interpretive theory: the process for creating a document tells us a good deal about the nature of that document and should thus inform interpretive method. As I argue below, this assumption underscores the importance of looking at the distinct institutional setting of presidential directives.

Notably, statutory interpretive theory has long been based on assumptions about the legislative process. For example, legal process purposivism urged interpreters to assume that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[63] Under this view, interpreters should discern the primary purpose underlying a statute and do their best to carry out that purpose in individual cases.[64] Beginning in the 1980s, however, legal scholars (influenced by public choice theory) built important interpretive theories based on a less rosy picture of the lawmaking process.[65]

Modern statutory textualism arose out of these interpretive debates.[66] Statutory textualists view the legislative process as a means to protect the interests of political minorities. As textualism's leading defender John Manning has emphasized, the bicameralism and presentment process of Article I, Section 7, creates a supermajority requirement for every piece of legislation.[67] These procedures thus also—

---

[62] To be sure, these theories do not focus exclusively on Article I. Some debates over statutory interpretation emphasize (at least in part) the meaning of the Article III judicial Power. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 993-95, 997 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 6-7 (2001). Ryan Doerfler has advocated a "'conversation' model of interpretation" that draws on due process principles of fair notice. *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1032-34, 1042-43 (2017).

[63] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[64] *See id.* at 1374 (advising that a court should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can," although "a court ought never to give the words of the statute a meeting they will not bear").

[65] *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1520, 1533 (1987) ("[a] model of dynamic statutory interpretation…would help to ameliorate some of the biases attendant to the legislative process"); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986) ("traditional methods of statutory interpretation" can "encourage[] passage of public-regarding legislation and impede[] passage of interest group bargains").

[66] Notably, early textualists drew heavily on public choice theory. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1289-90 (2010) (discussing this history and arguing that textualists gradually moved away from such a pessimistic vision of congressional lawmaking).

[67] *See* U.S. CONST. art. I, § 7; Manning, *Equity*, *supra* note 62, at 74-75. Statutory textualism has been most forcefully defended by John Manning. But earlier theories also

especially when supplemented by specific rules like the filibuster and committee gatekeeping—grant "political minorities extraordinary power to block legislation or insist upon compromise as the price of assent."[68] Statutory textualists argue that judges respect the "procedural rights" of political minorities by adhering to the specific provisions of the text.[69]

Textualists' assumptions about the legislative process also inform their view of legislative history. For example, textualists worry that legislators might manipulate the legislative record—intentionally inserting something that they could not convince their colleagues to enact into law.[70] At a minimum, textualists suggest, committee reports and floor statements are likely to be unreliable evidence of the statutory "deal."[71] Accordingly, reliance on legislative history could undermine the protections for political minorities.[72]

Recently, scholars and jurists have challenged modern textualism with competing theories of Article I and the lawmaking process.[73] In a nutshell, this commentary suggests that textualists "misunderstand Congress."[74] According to these commentators, interpreters can often best

---

emphasized the Article I lawmaking process. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("Under article I…support is not enough…If the support cannot be transmuted into an enrolled bill, nothing happens.").

[68] John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006); Manning, *Second-Generation*, *supra* note 66, at 1314 ("[t]he legislative procedures adopted by each House" "accentuate" the protections for political minorities).

[69] Manning, *What Divides?*, *supra* note 68, at 77 ("[T]extualists believe that adjusting a statute's semantic detail unacceptably risks diluting that crucial procedural right.").

[70] *See* SCALIA, *supra* note 67, at 34 ("the more courts have relied upon legislative history, the less worthy of reliance it has become"); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994) ("These clues are slanted, drafted by the staff and perhaps by private interest groups.").

[71] *See* SCALIA & GARNER, *supra* note 3, at 31-36, 376; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 364-66 (2005).

[72] *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675, 719 (1997) (allowing Congress to specify details in the legislative history "threat[ens] the constitutional safeguards of bicameralism and presentment"). Notably, textualists do not foreclose all reliance on legislative history. *See* SCALIA & GARNER, *supra* note 3, at 382 (recognizing that courts might look to legislative history to determine the "specialized meaning" of a technical term); John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559, 570-71 (2016) (same).

[73] Notably, a number of scholars have powerfully responded to the constitutional and institutional assumptions of modern textualism. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 56-59 (2006) (arguing that textualists focus too much on "the constitutionally prescribed lawmaking procedures" at the expense of other separation of powers principles, including the judiciary's role in blocking "unwise or unjust government action"). The discussion in this section does not aim to be comprehensive.

[74] I borrow this phrase from Victoria Nourse's illuminating work on statutory interpretation. *E.g.*, Nourse, *supra* note 6, at 1121-23. Notably, Nourse believes that many current theories—not simply textualism—misunderstand Congress. She urges all interpreters to learn more about congressional procedure. *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 7, 8-9, 15, 17, 64-95 (2016).

discern what lawmakers believed they were doing (including any compromises that they reached) by looking to sources outside the text. Thus, while textualists emphasize Article I, Section 7, Judge Robert Katzmann and Victoria Nourse point to Article I, Section 5, which grants each house the power to craft "the Rules of its Proceedings."[75] Each house has exercised that power to delegate matters—like the drafting of legislation—to committees, which then prepare reports for the entire body.[76] Some empirical work suggests that "members [of Congress] are more likely to vote…based on a reading of the legislative history than on a reading of the statute itself."[77] In other words, legislative history may very well be the *best* evidence of the statutory deal. Accordingly, as Abbe Gluck and Lisa Bressman argue, "[i]f one were to construct a theory of interpretation based on how members themselves engage in the process of statutory creation, a text-based theory is the last theory one would construct."[78]

This Article does not aim to resolve which theorists have the better argument as to statutory interpretation. Instead, I highlight these debates for two reasons. First, they underscore the extent to which interpretive theory depends on both constitutional structure and institutional setting. Second, they show that, for statutes, the emphasis is—as it should be—on the provisions and procedures governing Congress. This theoretical debate thus suggests that any theory for presidential directives should focus on the constitutional provisions and procedures governing the President.

III. AN ARTICLE II-BASED THEORY

The Constitution does not mention, much less spell out a procedure for creating, presidential directives. Nor does any federal statute prescribe an approach; the Supreme Court has held that the Administrative Procedure Act does not apply to the President.[79] But I argue that Article

---

[75] U.S. CONST. art. I, § 5, cl. 2.

[76] *See* ROBERT A. KATZMANN, JUDGING STATUTES 9-13, 48 (2014) ("Congress intends that its work should be understood through its established institutional processes and practices"); NOURSE, *supra* note 74, at 12, 161-81 ("Article I, section 5, the Rules of Proceedings Clause, supports the constitutionality of legislative evidence.")

[77] Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905-06, 968 (2013) (drawing on a survey of 137 congressional staffers). This work built on the pioneering study of Victoria Nourse and Jane Schacter, who interviewed sixteen staffers on the Senate Judiciary Committee. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576-77, 578-79 (2002). One limitation of these studies is that the authors talked to staffers rather than members of Congress. *See* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1936 n.151 (2015).

[78] Gluck & Bressman, *supra* note 77, at 969.

[79] *See* Franklin v. Massachusetts, 505 U.S. 788, 796, 800 (1992); *see also* Dalton v. Specter, 511 U.S. 462, 476 (1994) ("the President is not an 'agency' under" the APA). Although *Franklin* focused on arbitrary and capricious review, courts and commentators

II, particularly the Opinions Clause, gives the President considerable discretion to structure his decisionmaking process. Since at least the 1930s, presidents have used that power to invite executive officials to draft, negotiate over, and redraft directives.

This interagency consultation process has important implications for interpreting presidential directives. Although the President alone is responsible for the final decision, many directives do not reflect his preferred substantive policy. The President may opt, after consultation, to split the difference among agencies. I argue (in Part IV) that courts can best give effect to the structure the President has created—with its possibility for compromise and less-than-effective directives—by hewing closely to the text.

A. The Opinions Clause and Presidential Decisionmaking

One assumption of interpretive theory is that we can learn a great deal about the nature of a document—and thus the proper approach to interpreting that document—by understanding the process by which it is created.[80] Although neither the Constitution nor any federal statute prescribes a process for crafting presidential directives, I argue that a rarely-emphasized provision of Article II empowers the President to institute such a procedure: the Opinions Clause. The Clause provides that the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[81]

As background, I offer a brief overview of the literature on the Opinions Clause. To the extent scholars have discussed this provision, they have often focused on what the Clause says about *other* parts of Article II. Some scholars argue that the Opinions Clause undermines a central tenet of unitary executive theory.[82] Unitarians assert that, by

---

have found or assumed (reasonably enough) that presidential directives are exempt from the procedural requirements as well. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 318 (2006); Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1569 (2018) (discussing court decisions). Indeed, this "procedural exemption" may be the most important implication, given that plaintiffs can challenge many presidential directives by suing the enforcement official under the APA. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2404 (2018) (permitting, albeit without discussion of the plaintiffs' cause of action, a suit "challeng[ing] the application of [the] entry restrictions" in the third travel ban); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1194 (2009) (plaintiffs can "in almost all cases" sue "the subordinate federal official who acts upon the President's directive").

[80] *See* Part II(C) (discussing statutory debates).

[81] U.S. CONST. art. II, § 2, cl.1; *see also* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 647 (1996) (describing the provision as "one of the least discussed but most intriguing clauses of the United States Constitution").

[82] *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 33, 33-38, 119 (1994) (to read the Opinions Clause as "something more than a redundancy," one must assume "a vastly narrower conception" of

"vest[ing]" the "executive Power" in the President, Article II grants him control over all discretionary executive action, free from congressional interference.[83] Skeptics respond that if the Vesting Clause were that broad, the Opinions Clause would be superfluous; a President with unlimited authority over the executive branch could presumably "require the Opinion, in writing" of his subordinates.[84]

A few scholars have identified a more affirmative function for the Opinions Clause. At least if one accepts that Congress has some power to structure the executive branch, the Opinions Clause places an important constraint on that power.[85] Peter Strauss and Cass Sunstein have suggested that the Opinions Clause ensures that the President may "consult with and demand answers" from agency officials, so that he can evaluate their actions.[86] Under this view, the Clause provides a crucial mechanism for the President to supervise lower-level officials in both the executive and the independent agencies, without interference from Congress.[87]

---

presidential power than unitary executive theory); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2035-36 (2011) (the Opinions Clause casts doubt on the notion that "Article II's Vesting Clause confers illimitable presidential removal power").

[83] U.S. Const. art. II ("The executive Power shall be vested in a President of the United States of America."); *see* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-66 (1992) ("Unitary executive theorists...conclude that the President alone possesses *all* of the executive power").

[84] *See supra* note 82. Unitarians have offered answers to this challenge but have also acknowledged that the Opinions Clause may well be redundant. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 584-85 (1994) (the Clause may prevent the President from demanding an opinion on "personal legal problems"); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 30-31 (arguing that the Clause is redundant but still important because it deters Congress from passing a statute directing officials to report to Congress, rather than the President). In recent work, Sai Prakash has argued that the inclusion of the Opinions Clause served a *political* function by reassuring early Americans, who were accustomed to executives with "councils," that "the president would not lack for advice." SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 193-94 (2015); *see also infra* notes 101-104 and accompanying text (discussing those early councils).

[85] Akhil Amar has offered an account that would be consistent with many views of Article II. He suggests that the Opinions Clause prohibits the President from "requir[ing]" opinions from other branches—most notably, the judiciary. *See* Amar, *supra* note 81, at 655-57.

[86] Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 197, 200-04 (1986) (the Opinions Clause grants the President a "procedural" power to "control and supervise" officials, without congressional interference); Neil Thomas Proto, *The Opinion Clause and Presidential Decision-Making*, 44 MO. L. REV. 185, 199-202 (1979) ("the Opinion Clause is an affirmative power" that ensures the President may "gather[] the information…necessary to control and direct" executive officials).

[87] *See* Strauss & Sunstein, *supra* note 86, at 200 (arguing that this procedural supervisory power extends to both executive and independent agencies). A federal agency is typically

But I argue that the Opinions Clause does not simply provide the President with a tool to "check up" on his subordinates. The provision also invites the President to seek advice and counsel—an "Opinion, in writing"—from officials, so that he can make a more informed decision.[88] Indeed, the text of the Clause suggests that the information-gathering function may be its primary purpose.[89] The provision authorizes the President to ask "principal Officer[s]" for advice about "any Subject relating to the Duties of their respective Offices"—that is, the precise issues on which the officials will have greater expertise.[90]

Other structural features of Article II provide some assurance that the President will listen to such advice. The Appointments Clause empowers the President to nominate those "principal Officers."[91]

---

considered "independent" if the President cannot remove the agency's leaders at will. It seems to be an open question whether the Opinions Clause permits the President to demand opinions from the leaders of independent agencies. In separate (and later) work, Cass Sunstein along with Larry Lessig suggested (tentatively) that the Opinions Clause may not apply to "nonexecutive" agencies. *See* Lessig & Sunstein, *supra* note 82, at 34-38; *cf.* U.S. CONST. art. II, § 2, cl.1 ("[The President] may require the Opinion…of the principal Officer in each of the *executive* Departments"). But as Martin Flaherty has pointed out, that argument relies on an assumption that individuals at the Founding made a sharp distinction between "executive" and "nonexecutive" departments. Flaherty persuasively argues that is unlikely. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1796, 1798 (1996); *cf. also* PRAKASH, *supra* note 84, at 200 (arguing the term "*executive* departments" simply underscored that the President could not demand opinions from the Chief Justice—as had earlier drafts). Accordingly, I agree with other scholars that the Clause is most reasonably read to apply to both types of agencies. *See* J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2134 & n.239 (1989); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 646-48 (1984); *see also* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2323-25 (2001) (noting the scholarly consensus that the President may exercise a "'procedural' supervisory authority" over both types of agencies, and that the Opinions Clause may bar congressional interference).

[88] U.S. CONST. art. II, § 2, cl.1. A few scholars have recognized that the Clause serves this function, albeit with very little discussion. *See, e.g.*, Harvey C. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 LAW & CONTEMP. PROBS. 461, 463 (1970) (noting that one purpose of the Clause was to "provide [the President] with informed advice"); *see also* PRAKASH, *supra* note 84, at 194 (noting the Clause enables the President to "make informed decisions about law execution, foreign affairs, and the military").

[89] The origins of the Opinions Clause are obscure. *See* Lessig & Sunstein, *supra* note 82, at 33; *see also* Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 485-86 (2008) (describing the provision as "one of the seemingly strangest clauses in the original Constitution"). For a brief discussion of the history, see *infra* notes 101-104 and accompanying text.

[90] U.S. CONST. art. II, § 2, cl.1. Of course, as Akhil Amar has asserted, it seems likely that the President has discretion to determine *which* subjects relate to the duties of a given officer. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 326 (2012) (the President may determine what is "so closely 'relat[ed] to a given department head's official portfolio as to warrant a formal opinion").

[91] *See* U.S. CONST. art. II, § 2, cl.2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint…Officers of the United States").

Although the Senate must confirm each nominee, "they cannot themselves choose—they can only ratify or reject the choice of the President," leaving him with the power to select an alternative.[92] One presumes that most presidents select individuals who (the presidents believe) will offer cogent and helpful advice. Along the same lines, to the extent the President genuinely invites candor, his removal power would encourage a subordinate official to provide a candid opinion.[93]

Article II thus gives the President an important tool to learn from officials before he issues a directive—to invite them to *help him* ensure the faithful execution of the laws.[94] I argue that presidents have exercised this power in structuring the decisionmaking process for presidential directives. As described in the next section, presidents have sought out considerable input from agency officials prior to issuing presidential directives. Agency officials draft, negotiate over, and redraft the text of a given directive—debating (and often disagreeing over) not only the best policy but also the means of effectuating that policy. In this way, presidents gather information—advice on both whether to issue a directive and precisely what any such directive should say.

One might reasonably ask whether the Opinions Clause is a necessary source of power. That is, couldn't the President ask for advice, absent this provision? The answer depends in part on one's background assumptions about Article II. For unitary executive theorists, the Opinions Clause is unnecessary. The President's background "executive Power" would enable him to ask for opinions, absent interference from Congress.[95]

But for those with a less expansive view of presidential power, the Opinions Clause serves an important function—in two different respects. First, the Clause *ensures* that the President may seek advice from subordinates. That is, the provision places some constraint on Congress's power to interfere with that information-gathering function. (The Clause thus provides some support for the President's exemption from the procedural requirements of the Administrative Procedure Act.[96])

---

[92] THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (the Senate "may defeat one choice of the Executive" but "could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite").

[93] *See* Myers v. United States, 272 U.S. 52, 176 (1926) (the President must have "unrestricted power" to remove lower-level federal officials); *see also* Humphrey's Executor v. United States, 295 U.S. 602, 629, 631-32 (1935) (upholding "for cause" removal provisions for officials in independent agencies). If the President did *not* genuinely invite candor, of course, the official might worry about losing his job if he offered an "Opinion" that conflicted with the President's preferred position. But under the analysis here, that would be akin to a presidential decision not to seek out advice—a power that the President has under the Opinions Clause.

[94] *Cf.* U.S. CONST. art. II, § 3 ("[The president] shall take Care that the Laws be faithfully executed[.]").

[95] *See supra* notes 83-84 and accompanying text.

[96] To the extent that Congress imposed a procedural scheme, that would (arguably) violate the President's power to structure the manner through which he seeks out

Second, the Opinions Clause makes clear that the President has no duty to engage in such consultation. The Clause, after all, states that he "*may* require" the written opinion of agency officials.[97] Accordingly, the President may also opt *not* to seek advice. In this way, the Opinions Clause differs from the Take Care Clause, which provides that the President "*shall* take Care that the Laws be faithfully executed."[98] Although scholars debate whether the Take Care Clause imposes duties on the President,[99] I assume for present purposes that the Clause does impose certain obligations. Even if one makes that assumption,[100] the Opinions Clause clarifies that the President has an important choice of means in carrying out such duties: The President may, but need not, seek out advice from his subordinates in determining how to execute the laws.

The Constitution thus gives the President the choice to make an informed or ill-informed decision. In this respect, the Opinions Clause differs markedly from analogous provisions in early state constitutions. Those state provisions not only invited governors to seek advice from an executive "council" but required the governors to obtain the "consent" or "approval" of the council before taking certain actions.[101] The federal Constitution created no such mandatory council.[102] The President has the

---

information from subordinates. *Cf.* Franklin v. Massachusetts, 505 U.S. 788, 796, 800 (1992) (absent "an express statement by Congress" the Court would not construe the APA to apply to the President); *supra* note 79. This Article does not, however, aim to resolve whether Congress could impose some kind of procedural scheme.

[97] U.S. CONST. art. II, § 2, cl.1 (emphasis added).

[98] U.S. CONST. art. II, § 3 (emphasis added).

[99] *Compare, e.g.*, Calabresi & Rhodes, *supra* note 83, at 1198 n.221 (asserting that "the Take Care Clause bolsters the power-grant reading of the Vesting Clause of Article II"), *with, e.g.*, Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341, 377 (1989) ("("[T]he take care clause is better understood as a directive that the President must execute the law consistently with Congress' will, rather than as a grant of exogenously defined power...."); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 670 (1985) (asserting that that the Take Care Clause creates a "duty, not a license").

[100] *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842, 1875 (2015) (relying in part on the Take Care Clause in arguing that "a duty to supervise [officials] represents a basic precept of our federal constitutional structure"); *see also* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 72-73 (2009) ("the Constitution imposes a duty upon the President and all other executive branch officials to obey the law").

[101] *See* PRAKASH, *supra* note 84, at 39-42 (under some state constitutions, certain "exercises of [gubernatorial] power required the 'advice,' the 'consent,' or the 'advice and consent' of a council"); *see also* AMAR, *supra* note 90, at 326 ("many state governors…had to win the votes of council majorities for various proposed gubernatorial initiatives").

[102] The Opinions Clause grew out of proposals to create a "council" of advisors for the President. Interestingly, none of the proposals would have given the council veto power over any presidential decision. *See* Flaherty, *supra* note 87, at 1796-98; Proto, *supra* note 86, at 193-95 (tracing the Opinions Clause to proposals for a "council of State" and "Privy Council"). Ultimately, the entire "council" idea was abandoned—apparently in part out of a concern that the President would blame the council for bad decisions. *See* Flaherty, *supra* note 87, at 1796-97.

discretion to seek as much, or as little, advice as he chooses from his subordinates.

But this discretionary power also comes with an important corollary: Absent an executive council, the President must take responsibility for his (informed or ill-informed) decisions; he has no one to blame if things go wrong.[103] As Akhil Amar and others have underscored, the Opinions Clause "concentrate[s] accountability for presidential actions on the president himself."[104]

B. The Interagency Consultation Process

Article II gives the President considerable power to structure the process by which presidential directives are created. But the existing structure is largely unknown in the legal academic literature. This Article thus offers a window into that process—drawing on both political science research and my own interviews with executive branch officials from the Trump, Obama, George W. Bush, and other administrations.[105] Notably, these officials could not share details about particular directives. The process for crafting directives takes place almost entirely behind closed doors; the details are not publicly available for many years (if at all).[106] But the officials offered illuminating insights about the process itself.

A presidential directive may originate in one of two ways. The directive might be "top down": the President has a policy that he hopes to effectuate, so he asks an agency or White House official to draft a directive.[107] Alternatively, the directive might be "bottom up": an agency wants the executive branch to adopt a policy, but it lacks the authority to bind other agencies itself.[108] In either event, the directive tends to go through a fairly involved procedure.

---

[103] *See supra* note 102.

[104] AMAR, *supra* note 90, at 326-27; *accord* PRAKASH, *supra* note 84, at 194 ("the word 'opinions' suggests that the ultimate decisions were the president's, not the principal officers'"); Flaherty, *supra* note 87, at 1798 (agreeing that the Opinions Clause "furthers presidential accountability"); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 628 (2009) ("this structure was geared to ensure accountability"); Proto, *supra* note 86, at 194 (the history behind the Clause shows "the President has singular and ultimate accountability for his own decisions").

[105] *See supra* note 8 (listing interviews).

[106] *See* Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 PRES. STUD. Q. 138, 144-45, 147-57 (2012) (noting the Office of Management and Budget keeps a file on every executive order and that as of his 2012 article, "some executive order files [were] available up to late 1987").

[107] *See* Egan Interview, *supra* note 8 (sometimes the President "wants to take some action"); *see also* MAYER, *supra* note 9, at 61 ("[E]xecutive orders typically either originate from…the Executive Office of the President or percolate out from executive agencies desirous of presidential action.").

[108] *See, e.g.*, Fonzone Interview, *supra* note 8 (an agency may ask for a directive, because the President can bind the entire executive branch); *see also* Rudalevige, *supra* note 106, at 153 (reporting 6 out of every 10 executive orders in his study were initiated by federal agencies).

1. Executive Orders and Proclamations

The process for issuing some directives—executive orders and proclamations—is governed by executive order.[109] Current officials still look to President John F. Kennedy's Executive Order 11030.[110] But as political scientist Andrew Rudalevige has observed, the process—both on paper and on the ground—goes back much further.[111] Beginning in the 1930s, presidents issued a series of executive orders creating an interagency consultation process that largely mirrors the process used today.[112] Moreover, Kennedy's Executive Order 11030 and its predecessors supply only the basic outlines; many of the details discussed below are based on interviews or political science research. (The footnotes make clear the source of the information.)

a. The Process. Under Executive Order 11030, the Office of Management and Budget (OMB) oversees the process for an executive order or proclamation.[113] Once OMB receives a draft directive (which, as noted, has often been written by agency officials),[114] OMB shares the draft with other agencies that may have an interest in the issue. Officials then offer feedback, commenting on both policy and legal matters. Agency officials will point out, for example, if a statute prohibits that agency from carrying out the directive in the suggested manner (or at all).[115]

---

[109] Notably, this process does not apply to "hortatory" directives that, as one former official put it, "simply announce 'National Tree Day.'" De Interview, *supra* note 8. Such directives go through a more streamlined process. *See* Exec. Order No. 12080, 43 Fed. Reg. 42235 (Sept. 18, 1978). Nor does the process apply to international agreements. *See* Exec. Order No. 11030, § 5, 27 Fed. Reg. 5847, 5848 (June 19, 1962).

[110] *See* Exec. Order No. 11030, 27 Fed. Reg. 5847 (June 19, 1962). There have been some (minor) modifications. For example, President George W. Bush amended the order to reflect that directives were likely to be created by computer, rather than typewriter. See Exec. Order No. 13403, § 1, 71 Fed. Reg. 28543, 28543 (May 12, 2006); *see also infra* note 113 (noting a name change to "the Office of Management and Budget").

[111] *See* Rudalevige, *supra* note 106, at 148-49 (Franklin Roosevelt's Executive Order 6247 in August 1933 was the first that "created a standard process").

[112] Under orders issued by Presidents Franklin Roosevelt and Truman, the Bureau of the Budget (the predecessor to the Office of Management and Budget) would review a proposed executive order or proclamation; send the draft to the Attorney General for "form and legality" review; and the resulting directive would be published in the Federal Register. *See* Exec. Order No. 10006, 13 Fed. Reg. 5927, 5927, 5929 (Oct. 9, 1948); Exec. Order No. 7298 (Feb. 18, 1936).

[113] *See* Exec. Order No. 11030, §2, 27 Fed. Reg. 5847, 5847 (June 19, 1962) (the "Director of the Bureau of the Budget" should oversee the process). President Reagan later modified the order to reflect that the Bureau was renamed the Office of Management and Budget. *See* Exec. Order No. 12608, § 2, 52 Fed. Reg. 34617, 34617 (Sept. 9, 1987).

[114] *See supra* notes 107-108 and accompanying text. Kennedy's order specifically contemplates that. *See* Exec. Order No. 11030, § 2(a), 27 Fed. Reg. 5847, 5847 (June 19, 1962) (requiring the "originating Federal agency" to submit the draft to be reviewed).

[115] *See* Bies Interview, *supra* note 8 (agency officials raise both "policy-based" and "law-based" objections); Fonzone Interview, *supra* note 8 (the "coordination process" is designed in part to make sure the President has the legal authority to issue a directive).

Moreover, officials (and particularly legal counsel) often weigh in on the precise wording of the directive at issue.[116] Indeed, agency officials "pore[] over" these texts—and may get into "heated arguments over the use of a particular word"—because the resulting document could impact the power of the agency itself.[117] One former official remarked, "The more important the executive order, the more attention paid to the text."[118] Based on the feedback, OMB will redraft the directive, and send it out again for comment. Former officials suggested that many directives go through at least three drafts—and three rounds of comments—before leaving OMB.[119]

The President is not necessarily absent at this stage of the process. If a given directive is highly significant, then White House or Cabinet officials may ask the President to weigh in on a dispute among agencies.[120] But my research suggests that such direct presidential involvement is the exception rather than the rule. Agency officials debate most directives among themselves—with the oversight of OMB—and the President does not get involved until a final draft is ready for him to sign.

After the agency review, OMB sends the draft directive to the Department of Justice's Office of Legal Counsel (OLC) for "form and legality" review.[121] That is, OLC's job is to make sure the executive order or proclamation complies with the Constitution and any governing statutes

---

[116] *See* Egan Interview, *supra* note 8 (agencies "absolutely" argued about the text and explaining that "[t]he specific words do matter"; for example, stating that the Secretary of State should act "in consultation with" the Treasury Secretary means the two should discuss the matter, while "in coordination with" means the Treasury Secretary has a "veto" over the decision); McGahn Interview, *supra* note 8 (stating that a great deal of care goes into the text, because agencies need guidance on what to do); Otis Interview, *supra* note 8 (officials were "very careful" about the text); *see also* Luttig Interview, *supra* note 8 (lawyers tend to focus on the text).

[117] Fonzone Interview, *supra* note 8 (asserting that the language is "pored over," particularly if the order would impact multiple agencies, and that "an incredible amount of work" goes into "resolving differences" among agencies); Gray Interview, *supra* note 8 ("a lot of care would go into the drafting" of the text, "because this is like writing the law for the executive branch," and "[y]ou could get into heated arguments over the use of a particular word"); *see also* McGahn Interview, *supra* note 8 (agreeing that agencies debate the language, perhaps because they might be giving up power, or because they think they are better equipped to implement a given order).

[118] Fonzone Interview, *supra* note 8; *see* Gray Interview, *supra* note 8 (similarly noting that more care would be devoted to important directives).

[119] *See* Egan Interview, *supra* note 8; *see also* Gray Interview, *supra* note 8 (there might also "be one or more meetings involving the agencies with the biggest interest to hash out differences").

[120] *See* Gray Interview, *supra* note 8 ("the President might get consulted part-way through" and he "would make a decision on Contested points 1, 2, 3" but would "not be bothered a second or third time by appeals" from agency officials); *see also* Egan Interview, *supra* note 8 (the President "would almost certainly have been briefed and have opportunity to provide views" on an important directive).

[121] *See* Exec. Order No. 11030, § 2(b), 27 Fed. Reg. 5847, 5847 (June 19, 1962) (the Attorney General shall review "as to both form and legality"). The Attorney General has delegated this function to OLC.

or regulations. Although there are debates about how searching a review OLC provides, at least some directives apparently get stopped (or modified) at this stage.[122]

The next stop in what one former official described as a "marathon" is the White House Staff Secretary.[123] Although this position is not well known,[124] the Staff Secretary plays an integral role in the promulgation of every presidential document.[125] The Staff Secretary reviews the draft directive and often engages in another layer of consultation—this time, within the White House; the Staff Secretary checks to make sure that "relevant constituencies" within the Executive Office of the President are on board with the directive.[126] Finally (and possibly after some additional edits), the Staff Secretary sends the directive to the President.[127]

What does the President see? Notably, the President does not receive a copy of every comment by agency officials on earlier drafts of the directive. As a few former officials put it, the comments range from "thoughtful" to "crazy" or even "nonsense."[128] Instead, the President receives three documents: (1) the text of the directive; (2) OLC's "form and legality" certification; and (3) a memo (typically prepared by the Staff Secretary or another White House official) summarizing the interagency consultation process and any remaining points of disagreement—with a focus on "high-level objections" from Cabinet members or other top officials.[129] The President then opts to sign (or not sign) the directive.[130]

---

[122] *See* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 359-62 (1993) (noting "form and legality" letters "may be viewed by some, outside of OLC, as mere legal 'formalities'" but disputing that notion); *see also* Luttig Interview, *supra* note 8 (during his time at OLC, he carefully reviewed each document, but stating the OLC culture is to offer an "expansive understanding" of presidential power).

[123] De Interview, *supra* note 8.

[124] The position recently got attention, however, because the most recent Supreme Court nominee Brett Kavanaugh is a former Staff Secretary. *See* Jessica Gresko, *Senators spar on access to Kavanaugh's staff secretary work*, WASH. POST (July 27, 2018).

[125] *See* De Interview, *supra* note 8 (describing his work as Obama Staff Secretary); https://www.whitehouse.gov/get-involved/internships/presidential-departments (the Staff Secretary is "the gate-keeper of paper flowing into and out of the Oval Office").

[126] *See* De Interview, *supra* note 8 (most of the "vetting" for executive orders happens through the interagency consultation process headed by OMB but, as Staff Secretary, he would also "mak[e] sure relevant constituencies in the White House" were "on board"); Bies Interview, *supra* note 8 ("OMB runs the agency clearance" process, while the "Staff Secretary runs White House clearance").

[127] *See* De Interview, *supra* note 8.

[128] *E.g.*, *id.* (the comments ranged from "thoughtful things" to "nonsense."); Egan Interview, *supra* note 8 (describing some comments as "crazy," some "not-so-crazy").

[129] *See* De Interview, *supra* note 8; Gray Interview, *supra* note 8 (the President received the summary memo and "of course" would get the text "because that is what the President signs"); Egan Interview, *supra* note 8 (the President receives the text of the order along with an "action memorandum" that describes only "high-level objections").

[130] Former officials told me that the President typically signs the directive, although there are occasions when he will "kick it back." Gray Interview, *supra* note 8; *see* Egan

b. Examples. A scuffle within the Carter administration illustrates the negotiation process among agencies. As political scientist Kenneth Mayer recounts, there was a dispute among federal agencies over a draft executive order that would implement the National Environmental Policy Act (NEPA).[131] The main issue was whether (and the extent to which) the order should direct federal agencies to prepare environmental impact statements for actions in foreign countries.[132] Although the Council on Environmental Quality pushed for a broad order, a string of federal agencies—including the State Department, the Defense Department, and the Nuclear Regulatory Commission—insisted that NEPA should be limited to domestic conduct.[133]

Given the importance of the issue, President Carter weighed in during the agency review. Although Carter reportedly favored a broad interpretation of NEPA,[134] that is not the position he took. Instead, as Mayer explains, Carter opted to "split[] the difference" among the agencies.[135] The resulting directive—Executive Order 12114—required environmental impact statements for some foreign actions but contained a number of restrictions and exemptions; for example, nuclear facilities were exempted, as the State Department had requested.[136]

Accordingly, President Carter made the ultimate decision to issue the directive. But the content was not his first-best policy choice. Nor was this an exceptional case. As political scientist Andrew Rudalevige recounts (based on detailed archival research of executive orders from the Truman through the Reagan administrations, as well as data from the Clinton administration), presidents have often issued compromise orders—accommodating the competing recommendations of agencies.[137]

Indeed, this interagency consultation process may even lead the President to issue a largely "toothless" order. An episode from the Clinton administration illustrates this point. A proposed executive order would have required federal agencies to evaluate the effect of agency action on

---

Interview, *supra* note 8. The text of the executive order or proclamation is then published in the Federal Register. *See* Exec. Order No. 11030, § 3, 27 Fed. Reg. 5847, 5848 (June 19, 1962); *see also* 44 U.S.C. § 1505(a) (proclamations and executive orders with "general applicability and legal effect" shall be published in the Federal Register).

[131] *See* 42 U.S.C. § 4321 et seq.; MAYER, *supra* note 9, at 61-65.

[132] *See* MAYER, *supra* note 9, at 61-65 (describing "a protracted wrangle between the foreign affairs/defense and environmental agencies about the foreign application of" NEPA).

[133] *See id.* at 62 (the concern was that "applying NEPA abroad would undercut foreign policy objectives…and interfere with foreign trade and economic development").

[134] *See id.* at 62.

[135] *Id.* at 63-64 ("Carter himself resolved the outstanding issues…more or less splitting the difference between the agencies").

[136] *See* Exec. Order No. 12114, 44 Fed. Reg. 1957 (Jan. 4, 1979); MAYER, *supra* note 9, at 64 (noting the order's requirements were far less that NEPA demanded of domestic conduct).

[137] *See* Rudalevige, *supra* note 106, at 142-44, 150-51; *see also* MAYER, *supra* note 9, at 65 ("The story of Executive Order 12114 is hardly exceptional").

children's environmental health—and, to the extent an agency "failed to protect children fully," to explain and justify that failure.[138] Although one might think that children's health would be an uncontroversial topic, the directive went through months of negotiations. As Rudalevige describes, some agencies worried that the order would open them up to lawsuits; the Department of Health and Human Services wondered how it could legitimately say that "tobacco remained a legal product," given that "[b]anning it would clearly be better for children's health."[139] Even after White House officials had substantially softened the language of the order, President Clinton himself weighed in, suggesting that he "'might want to ease [the] burden a bit'" more.[140] The final order did instruct agencies to pay attention to children's environmental health, but only "to the extent permitted by law" and only as "appropriate, and consistent with the agency's mission."[141]

Finally, the interagency consultation process may block new directives entirely—even those strongly favored by the President. This point is underscored by a lengthy debate over Lyndon Johnson's Executive Order 11246, which not only prohibits government contractors from discriminating on the basis of "race, color, religion, sex or national origin" but also requires them to engage in "affirmative action."[142] When affirmative action became a more controversial topic in the 1980s and 1990s, so did Executive Order 11246. The order was a thorn in the side of the Reagan and George H.W. Bush administrations, and both attempted to issue a new order to revoke it.[143] Notably, presidential directives remain in force until they are revised or revoked.[144] And executive officials

---

[138] *See* Rudalevige, *supra* note 106, at 142-44 (recounting the four-month-long debate).
[139] *Id.* at 144.
[140] *Id.* ("Even as the president was urged to issue the order, several departments continued to press their reservations" and "President Clinton requested still more changes").
[141] Exec. Order 13045, § 1, 62 Fed. Reg. 19885, 19885 (April 21, 1997) ("[T]o the extent permitted by law and appropriate, and consistent with the agency's mission, each Federal agency: (a) shall make it a high priority to identify and assess environmental health risks…that may disproportionately affect children; and (b) shall ensure that its" actions address those risks).
[142] *See* Exec. Order No. 11246, § 202, 30 Fed. Reg. 12319, 12320 (Sept. 24, 1965). Interestingly, the language barring discrimination on the basis of "sex" comes from Executive Order 11375, which President Lyndon Johnson issued a few years later. Exec. Order No. 11375(3), 32 Fed. Reg. 14303, 14304 (Oct. 13, 1967). Yet courts and commentators commonly refer to the sum total of the orders as "Executive Order 11246." *See, e.g.*, Contractors Assoc. of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 163 & n.6 (3d Cir. 1971) (the "wording comes from Exec. Order No. 11375, … and represents a *minor change* from the original") (emphasis added); *see also* United States v. Duquesne Light Comp., 423 F. Supp. 507, 508-10 (W.D. Pa. 1976) (discussing only Executive Order 11246 in a suit alleging "discriminat[ion] against blacks and women").
[143] *See* MAYER, *supra* note 9, at 206-10 (describing these efforts and noting "[b]y the 1980s affirmative action" was "anathema to the Reagan administration").
[144] *See* COOPER, *supra* note 18, at 121 ("executive orders and other pronouncements…remain in effect" until "they are amended, superseded, or rescinded").

assume that any new directive—even one modifying a prior directive—should go through the same basic process.[145]

This process did not go smoothly for President Reagan or Bush. Although the Department of Justice strongly pushed for revocation of Executive Order 11246, the Office of Equal Employment Opportunity and the Department of Labor adamantly fought to retain the executive order.[146] Moreover, Mayer reports that the Labor Department's "congressional allies" heard about the planned revocation (as did some civil rights groups), and they pressured each administration to stay the course.[147] Ultimately, both Presidents Reagan and Bush backed down and left Executive Order 11246 in place.[148]

2. Other Directives

Kennedy's Executive Order 11030 applies only to directives labeled as "executive orders" or "proclamations."[149] Since at least the George H.W. Bush administration, presidents have also relied on presidential "memoranda," which are in substance identical to executive orders.[150] Moreover, since the mid-twentieth century, presidents have issued national security directives under various labels—for example, "policy papers," "presidential policy directives," or simply "directives."[151] There is no official process for crafting these directives. Yet my interviews indicate that these directives also go through agency review.[152] As one former Staff Secretary explained, there is no "formalistic distinction" among documents; "a great deal of care" generally goes into any "product that the President is going to sign."[153]

The main differences are that OMB does not oversee the creation of memoranda or national security directives, and OLC does not

---

[145] *See* De Interview, *supra* note 8 (the same basic process was used for substantive revisions); Gray Interview, *supra* note 8 (the process was and should be "the same").

[146] *See* MAYER, *supra* note 9, at 206-08; RICARDO JOSÉ PEREIRA RODRIGUES, THE PREEMINENCE OF POLITICS: EXECUTIVE ORDERS FROM EISENHOWER TO CLINTON 82-83 (2007). Notably, the Labor Department enforces Executive Order 11246. *See* Exec. Order No. 11246, §201, 30 Fed. Reg. 12319, 12319 (Sept. 24, 1965).

[147] *See* MAYER, *supra* note 9, at 206-08.

[148] *See id.* at 209-10, 213 ("Executive Order 11246 has proven amazingly durable."). After the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena* (which involved separate requirements for government contractors), the Clinton administration made changes to Executive Order 11246. *See* 515 U.S. 200, 206-10, 235-39 (1995) (holding that all racial classifications must be subject to strict scrutiny); MAYER, *supra* note 9, at 210-12 (the changes were "confined to contracting set-asides, not to the affirmative-action employment practices required of government contractors").

[149] *See* Exec. Order No. 11030, 27 Fed. Reg. 5847 (June 19, 1962).

[150] *See* COOPER, *supra* note 18, at 16 (memoranda are "sometimes us[ed]…interchangeably with executive orders").

[151] *See id.* at 206, 208-09. My research suggests that courts rarely weigh in on the meaning of national security directives. That is perhaps not surprising, given that many are classified.

[152] *See infra* notes 154-160 and accompanying text.

[153] De Interview, *supra* note 8.

necessarily review the documents for "form and legality."[154] Instead, the White House Counsel's office (or another entity in the Executive Office of the President) generally oversees the process.[155] But the process otherwise appears to be quite similar. The relevant entity in the White House sends the draft (which, again, is often written by agency officials) to interested agencies, gets feedback on both law and policy, redrafts, and then sends it out again (perhaps multiple times).[156] As with executive orders and proclamations, the President may be consulted about important directives.[157] The document then goes to the Staff Secretary, who may invite additional comments.[158]

The Staff Secretary sends the text of the resulting directive to the President, along with a memo summarizing the interagency consultation process (again, with a focus on "high-level" issues).[159] Thus, the President does not hear about every single agency comment, but former officials stated that it would be "very bad form" not to advise the President about major disagreements from Cabinet or other top officials.[160] The President then decides whether to sign the resulting document.[161]

3. Deviations

There is another factor that further diminishes the distinction among directives: whether a directive is styled as an "executive order," "proclamation," "memorandum," or something else entirely, *executive actors feel free to use a different process*.[162] In other words, presidents do not consistently follow Kennedy's Executive Order 11030.

---

[154] *See id.* (noting that documents not labeled "executive orders" or "proclamations" would generally not go to OLC); *see also* Bies Interview, *supra* note 8 (same).

[155] *See* Egan Interview, *supra* note 8 ("by tradition," the process is run by "the part of the White House responsible for that policy" and that entity endeavors to make sure the issues are "fully developed" and "thoroughly reviewed" by relevant agencies).

[156] *See* Fonzone Interview, *supra* note 8 (agencies "with expertise are consulted" and they "likely" helped "draft [the directive] in the first instance"); Gray Interview, *supra* note 8 (regardless of the label, "the proposed document would be circulated for comment").

[157] *See* Gray Interview, *supra* note 8 (the President might be consulted and then he "would make a decision on Contested points 1, 2, 3").

[158] *See* De Interview, *supra* note 8.

[159] *See id.* (the "package to the President" includes the text and the summary memo); Egan Interview, *supra* note 8 (the President receives the text of the directive along with an "action memorandum" that describes only "high-level objections").

[160] Egan Interview, *supra* note 8; Fonzone Interview, *supra* note 8 (asserting that a "good staffer" must inform the President about any major disagreements among agencies).

[161] If the President signs the directive, he may—and often does—publish the resulting document in the Federal Register. *See* 44 U.S.C. § 1505(a).

[162] *See* De Interview, *supra* note 8 (there was no "formalistic" divide between an "executive order," "proclamation," or other document, and no particular "machinery" for any given directive; the White House might use a formal process for a memorandum; conversely, the White House might use a truncated process for an executive order); *see also* MAYER, *supra* note 9, at 60-61 ("[t]here is no penalty for avoiding" Kennedy's Executive Order 11030, and thus "when the White House is under time pressure it routinely bypasses the formal routine").

In this way, presidents take full advantage of the flexibility offered by the Opinions Clause. That provision gives the President the discretion to seek out as much, or as little, counsel as he deems necessary. And as several former officials (from both Democratic and Republican administrations) explained, there are reasons why the President may seek advice on certain directives from a smaller group. Some executive orders are "politically sensitive."[163] If such draft orders are broadly distributed to agency officials (through the usual OMB process), the existence of that draft may be leaked before it has been fully vetted. Accordingly, the White House Counsel's Office may oversee the agency review itself (or ask OMB to use a different process), sending the draft order only to high-level agency officials who will be cautious about sharing the information.[164] Some orders may even skip OLC "form and legality" review.[165] Accordingly, regardless of the label, a President may opt for a modified process.

Nevertheless, officials repeatedly reaffirmed that virtually all directives go through some type of agency review. Moreover, for any directive, the process can be tedious. Although it is easier to issue a presidential directive than to enact legislation, the process takes a good deal longer than one might expect—anywhere from several weeks to several months (or even years).[166] Indeed, one former official remarked that "newbies" in his office would complain that it could "take forever" to issue a presidential directive.[167]

IV. THE CASE FOR TEXTUALISM

The Opinions Clause of Article II invites the President to seek out advice from his subordinates in order to make a more informed decision. I argue that presidents have exercised that power in structuring the

---

[163] De Interview, *supra* note 8 (explaining that the White House might use a different process for a "sensitive" executive order); Luttig Interview, *supra* note 8 ("[i]f you've got something politically sensitive, politically focused," then you would not follow the regular process); *see also* Gray Interview, *supra* note 8 (stating that such departures were "rare" during the George H.W. Bush administration).

[164] De Interview, *supra* note 8 (describing the Office of Management and Budget as akin to a "machine" that has a formal process in place for executive orders, and that a very well-meaning career person might share a "sensitive" draft order too broadly); *see also* Egan Interview, *supra* note 8 (agreeing that an executive order might bypass the typical process if it is "sensitive" and noting that OMB itself has ways to "expedite" the process, at least in the national security realm).

[165] Political scientist Kenneth Mayer reports that the "most commonly skipped step" is OLC "form and legality" review. MAYER, *supra* note 9, at 60-61 (stating that, in such cases, OMB staff "rely[] on informal legal guidance as a substitute.").

[166] *See* Egan Interview, *supra* note 8 ("sometimes these documents are argued over in the executive branch for weeks or months"); MAYER, *supra* note 9, at 61 ("Simple executive orders navigate this process in a few weeks; complex orders can take years, and can even be derailed over the inability to obtain the necessary consensus or clearances.").

[167] Egan Interview, *supra* note 8 (some officials viewed the process as "inefficient or bureaucratic").

interagency consultation process for presidential directives. Many directives go through weeks or even months of negotiation; after that process, the President may well decide to issue a compromise or toothless directive—or perhaps no directive at all. Through this process, presidents have (perhaps surprisingly) exercised the power to tie their own hands—and accept the recommendations of their subordinates.

Although Article II does not require the President to engage in such consultation, the existence of this process has important implications for interpreting presidential directives. A court should not assume that any directive perfectly implements its apparent purposes; nor should a court assume that the directive reflects the President's preferred substantive policy. Any presidential directive may reflect the President's own decision to balance competing interests. Alternatively, and particularly when the President opts for a truncated process, he may well issue a directive that (in hindsight) appears to be ill-considered. The Constitution gives him the power to make—and holds him accountable for—those ill-informed decisions as well. Federal courts, I argue, can best give effect to these presidential decisions by adhering to the text of a directive.

A. Preliminary Questions: Author's Intent or Purpose?

Once we turn our focus to Article II, a natural assumption might be that interpreters should focus on the intent of the President. After all, in sharp contrast to statutes enacted under Article I (which must receive the assent of the multi-member Congress and the President), presidential directives seem to have a unitary author. For similar reasons, one might assume that any public statements made by the President should inform the meaning of presidential directives.[168]

This assumption is very reasonable—until one learns about the complex process that presidents have crafted for issuing presidential directives. As discussed, interpretive theorists assume that the process for creating a document should inform interpretive theory, and presidents use a distinct process to create presidential laws. One of the central contributions of this Article is to familiarize readers with that process.

Presidents, of course, say a lot of things—in the State of the Union Address, other speeches, interviews, press conferences, and even on

[168] To be clear, this Article focuses on the meaning, not the validity, of presidential directives. For arguments that public statements by the President should be relevant to an analysis of constitutionally impermissible motive, see Shaw, *supra* note 4; *see also* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1273 (2018) (arguing for consideration of campaign statements). For an insightful analysis of such inquiries in the legislative context, see Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016); *see also* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008). This Article thus does not address whether the Supreme Court should have considered President Trump's public statements in evaluating the constitutionality of the third version of the travel ban. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2416-23 (2018) (rejecting an establishment clause challenge to the ban).

Twitter.[169] But not every presidential declaration becomes a presidential *law*. Instead, that designation is limited to a subset of presidential issuances—those labeled "executive orders," "proclamations," "memoranda" and the like—that aim to direct the actions of subordinate officials.[170] This designation as a presidential law is important, because such laws bind not only lower-level officials but also *future presidents*. As my interviews underscored, executive officials assume that a presidential directive governs all successive administrations until the directive is formally revised or revoked.[171] Other presidential speeches do not have the same binding force across administrations.

For these presidential laws, presidents rely on a complex process through which agency officials draft, revise, and redraft directives. At the end of this process, a President may opt to sign a directive that does not reflect his preferred substantive policy ("purpose") or wishes ("intent").[172]

---

[169] For a recent overview, see generally Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017).

[170] Since 1935, these directives (regardless of the label) have generally been published in the Federal Register. *See* 44 U.S.C. § 1505(a); *see also supra* notes 21-22, 32-40, 184 (citing presidential directives). One possibility is that courts could use publication in the Federal Register as a "rule of recognition" to distinguish presidential laws from other presidential speech. This Article brackets that question, in large part because there seems to be widespread agreement as to what constitutes a presidential law as opposed to other speech. *See, e.g.*, Shaw, *Bully Pulpit*, *supra* note 169, at 93 (differentiating "presidential speech" from "presidential action" like executive orders, presidential memoranda, proclamations, and executive agreements). The recent controversy surrounding transgender individuals in the military helps illustrate this point. In a series of tweets, President Trump declared that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." But the Department of Defense took no action until the President followed up with a formal memorandum. *See* Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security: Military Service by Transgender Individuals, § 1(b), 82 Fed. Reg. 41319 (Aug. 25, 2017); Bryan Bender & Jacqueline Klimas, *Pentagon takes no steps to enforce Trump's transgender ban*, POLITICO (June 27, 2017), https://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029 (explaining that the Department of Defense did not treat the initial tweets as a binding directive). Even if executive officials in the Trump administration had treated the tweets as a presidential directive, it is highly unlikely that any subsequent administration would have done so. By contrast, a subsequent administration will treat the presidential memorandum as a directive that remains in force until it is revoked. *See infra* note 171 and accompanying text.

[171] Notably, *every* official I interviewed treated the binding nature of directives as a given. *See supra* notes 144-145 and accompanying text. This accords with both official declarations of the executive branch and political science research. *See, e.g.*, Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29-30 (2000) ("[A] presidential directive…would remain in force, unless otherwise specified, pending any future presidential action."); COOPER, *supra* note 18, at 2 ("executive orders and other pronouncements…remain in effect unless and until they are amended, superseded, or rescinded").

[172] To be sure, "intent" is a challenging concept, one that is not always clearly defined or distinguished from "purpose." But one can think of "intent" as a wish for how a law will be applied in a particular case, while "purpose" is "'the general aim or policy which pervades a [law] but has yet to find specific application.'" Manning, *Second-Generation*,

Relatedly, as discussed further below, the resulting directive may be in considerable tension with the President's other public statements.[173] The President may opt for compromise in the directive, taking into account the competing wishes of agency officials.

Part V explores some reasons why presidents may choose to tie their own hands through the interagency consultation process. But for now, it is important to understand that presidential directives often do not reflect the author's intent or perfectly carry out a single purpose. It turns out that "unilateral" presidential directives are less unilateral than one might have presumed.

B. Consultation and Presidential Decisionmaking

Presidential directives are often the product of a compromise among agencies. I argue here that a focus on the text will enable courts to best capture those presidential decisions. But I first examine the less common (but still important) scenario: when the President bypasses most of the established process. Article II, I suggest, has lessons for that scenario as well.

1. Lack of Consultation and Accountability

In January 2017, President Trump issued his first travel ban, which suspended the entry of individuals from seven predominantly Muslim countries.[174] Although we still do not know the details of the process leading up to that directive, there seems to be widespread agreement that it bypassed virtually all agency review.[175] Notably, that was true, even though the directive was styled as an "executive order."

In the litigation over that first travel ban, one central issue was whether the White House Counsel could issue a memorandum narrowing the scope of the executive order. The issue arose out of confusion over

---

supra note 66, at 1291 n.22 (quoting Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370-71 (1947)).

[173] *See infra* Part IV(B)(2)(b), (C).

[174] *See* Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order 13769, § 3(c), 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017); Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) ("[S]ection 3(c) of the Executive Order suspends for 90 days the entry of aliens from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.").

[175] *See* Kim Soffen & Darla Cameron, *How Trump's travel ban broke from the normal executive order process*, WASH. POST (Feb. 9, 2017) (reporting that the order was reviewed by the OLC, but that it skipped most, if not all, of the consultation process); Evan Perez, Pamela Brown, & Kevin Liptak, *Inside the confusion of the Trump executive order and travel ban*, CNN (Jan. 30, 2017) (the White House contended that "OLC signed off and agency review was performed," but "[a] source said the creation of the executive order did not follow the standard agency review process"). Some federal courts accepted the reports that the first travel ban bypassed most review. *See* Int'l Refugee Assist. Project v. Trump, 241 F. Supp. 3d 539, 545 (D. Md.), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017) ("The drafting process…did not involve traditional interagency review… [T]here was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security.").

whether the ban applied to lawful permanent residents (LPRs). The text was certainly broad enough to encompass such individuals. The President "proclaim[ed] that the immigrant and nonimmigrant entry…of aliens from [the seven] countries…would be detrimental to the interests of the United States" and thus "suspend[ed] entry…of such persons for 90 days."[176] Moreover, the executive order expressly "exclude[d]" certain visa holders from the travel ban, including "foreign nationals traveling on diplomatic visas."[177] LPRs were notably absent from the list of exceptions. But soon after the executive order was challenged in court, the White House Counsel issued a memorandum "clarify[ing]" that the ban did not "apply to lawful permanent residents."[178]

Federal courts disagreed sharply over whether they should accept the "clarification" offered by the White House Counsel.[179] The lessons of the constitutional structure strongly suggest that the answer should be no.[180]

The Opinions Clause of Article II permits, but does not require, the President to seek advice from subordinates. Accordingly, the President had the constitutional power to forego agency review. But another lesson of the Opinions Clause is that the President must be accountable for the resulting (perhaps ill-informed) decision. Our Constitution created no council of advisors with veto power over presidential decisions—and thus no council for the President to blame if things went wrong.[181] A logical corollary of that structural principle would be that the President's subordinates also cannot fix any presidential errors after the fact. The Opinions Clause "concentrate[s] accountability for presidential actions on the president himself."[182]

---

[176] Exec. Order 13769, § 3(c), 82 Fed. Reg. 8977, 8978 (Jan. 27, 2017).

[177] *Id.*

[178] Memorandum to the Acting Secretary of State, the Acting Attorney General, and the Secretary of Homeland Security from Counsel to the President, Donald F. McGahn II (Feb. 1, 2017) [http://perma.cc/Q4GQ-HPCK].

[179] *Compare* Louhghalam v. Trump, 230 F. Supp. 3d 26, 32-33 (D. Mass. 2017) (concluding, based in part on the White House Counsel's memorandum, that the executive order did not apply to lawful permanent residents, and thus the claims as to those plaintiffs was moot), *with* Washington v. Trump, 847 F.3d 1151, 1165-66 (9th Cir. 2017) (declining to credit the memorandum); Aziz v. Trump, 234 F. Supp. 3d. 724, 727-28 (E.D. Va. 2017).

[180] Under the Presidential Subdelegation Act of 1950, the President may delegate certain functions to subordinates via directive. But that statute did not apply here for two reasons. First, the statute permits delegation only to an official subject to Senate confirmation. The White House Counsel does not undergo a Senate vote. Second, any such delegation must be in the text of the directive or otherwise published in the Federal Register. President Trump's order said nothing about a delegation to the White House Counsel. *See* 65 Stat. 712 (1951) (codified at 3 U.S.C. § 301) ("[s]uch designation and authorization shall be in writing [and] shall be published in the Federal Register"). Notably, such issues of presidential delegation present many challenging questions that are beyond the scope of this Article.

[181] *See* Part III(A).

[182] AMAR, *supra* note 90, at 326-27.

2. Consultation, Compromise, and Even Toothless Directives

As commentators suggested at the time of the first travel ban, and as my own research confirmed, most directives go through a far more searching review. This process has important implications for interpretive method. At the end of the interagency consultation process, presidents may opt to issue compromise or even watered-down directives. I argue that federal courts should respect the President's decision to accept half a loaf. And courts can best respect that decision by adhering to the text.

a. Compromise Directives. As we have seen, when agencies in the Carter administration were divided over a draft executive order, the President "split[] the difference" among the agencies and issued an order that did not reflect his preferred substantive policy.[183] Along the same lines, a President may opt to issue a directive that does not perfectly implement its apparent purposes. For that reason, I argue that courts should adhere to the limitations in the text, rather than attempt to carry out the apparent purpose of a directive.

A dispute over an executive order issued by President Clinton under the International Emergency Economic Powers Act (IEEPA) helps to illustrate this point. The IEEPA permits the President to block financial transactions involving a country that presents a national security threat.[184] Any person who violates such an executive order may be subject to civil or criminal penalties.[185]

Mohammad Reza Ehsan was criminally prosecuted for violating Clinton's Executive Order 12959, which prohibited the "export[]" of goods to Iran.[186] Ehsan had ordered the shipment of a product from the United States to Dubai, apparently planning to send it later to Iran.[187] Ehsan argued, however, that this shipment was "not an impermissible 'export'" (from the United States to Iran) but a *permissible* "export" (from the United States to Dubai) and "reexport'" (from Dubai to Iran).[188]

---

[183] MAYER, *supra* note 9, at 63; *see supra* Part III(B)(1)(b).

[184] *See* 50 U.S.C. §§ 1701(a), (b), 1702. For other litigation over IEEPA executive orders, see Kirschenbaum v. 650 Fifth Ave., 830 F.3d 107, 117, 124-25, 142 (2d Cir. 2016) (addressing the definition of "Iran" in Exec. Order No. 13599, 77 Fed. Reg. 6659 (Feb. 5, 2012)); United States v. Hassanzadeh, 271 F.3d 574, 576, 579, 581-83 (4th Cir. 2001) (determining that goods "of Iranian origin" encompass Persian rugs under Exec. Order No. 12613, 52 Fed. Reg. 41,940 (Oct. 29, 1987)); United States v. Elashi, 440 F. Supp. 2d 536, 541-43, 568-70 (N.D. Tex. 2006) (concluding that the defendant's property fell within the ban in Exec. Order No. 12947, 60 Fed. Reg. 5,079 (Jan. 23, 1995)).

[185] *See* 50 U.S.C. § 1705 (making it "unlawful" to violate any order issued pursuant to the IEEPA, with penalties including imprisonment up to 20 years).

[186] 163 F.3d 855, 856 (4th Cir. 1998).

[187] *See id.* at 857. Ehsan was not a sympathetic defendant. He had attempted to order the product (a Transformer Oil Gas Analysis Systems (TOGAS)) from a U.S. company for direct shipment to Iran. The U.S. company declined, because of the export ban. So then Ehsan ordered that the product be shipped to Dubai, with plans to send it to Iran. U.S. customs agents learned about the deal, and Ehsan was arrested by federal agents. *See id.*

[188] *Id.* at 859 ("Ehsan insists that the government may not prosecute him for an export to Iran when he reasonably could have thought he was engaged in reexportation.").

There was considerable support for Ehsan's interpretation in the text of the order. Executive Order 12959 broadly barred "the exportation from the United States to Iran…of any goods, technology…or services."[189] But the order prohibited "the reexportation to Iran" only of "any goods or technology" subject to certain licensing requirements.[190] All parties agreed that Ehsan's product was not subject to those licensing rules.[191] Moreover, the term "export" is often used to refer to the movement of goods from the United States to a foreign country, while "reexport" refers to the shipment of goods from a foreign country to another foreign country.[192]

Executive Order 12959 appeared to reflect a compromise. The primary focus was, of course, ensuring that products were not sent directly from the United States to a country the President viewed as an international sponsor of terrorism.[193] But "reexportation" is a potentially trickier issue, because it involves the passage of goods between two foreign countries.[194] After consultation with interested agencies (which would almost certainly have included the State Department, Treasury Department, and National Security Agency),[195] the President might reasonably have opted to bar "reexportation" in more limited circumstances. Accordingly, Ehsan had a strong argument that he could export goods (from the United States to Dubai), and then reexport them (from Dubai to Iran) without running afoul of the order.

The *Ehsan* court did not consider that possibility. Instead, the court interpreted the executive order in accordance with what the court found to be its "obvious purpose."[196] "[T]he Executive Order intended to

---

[189] Exec. Order No. 12959, §1(b), 60 Fed. Reg. 24757, 24575 (May 8, 1995) (prohibiting "the exportation from the United States to Iran…of any goods, technology (including technical data…subject to the Export Administration Regulations…), or services").

[190] *Id.* §1(c) (prohibiting "the reexportation to Iran…of any goods or technology (including technical data or other information) exported from the United States, the exportation of which to Iran is subject to [certain] export license application requirements").

[191] 163 F.3d at 857 n. 1 (Ehsan's product was "exempt from the reexportation ban").

[192] That is true, for example, of the Department of Commerce's Export Administrative Regulations (EAR), which were issued pursuant to the Export Administration Act of 1979. *See* 15 C.F.R § 734.13(a) (defining "export" as "[a]n actual shipment or transmission out of the United States"); 15 C.F.R. § at § 734.14(a) (defining "reexport" as "[a]n actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country"). Notably, Clinton's order expressly referred to those regulations. *See supra* note 189.

[193] *Cf.* United States v. Ehsan, 163 F.3d 855, 859 (4th Cir. 1998) (the President sought in part to "sanction[] Iran's sponsorship of international terrorism").

[194] *See supra* note 192 (citing sources defining "reexportation" as the movement of goods from one foreign country to another foreign country).

[195] *See* Fonzone Interview, *supra* note 8 (noting the agencies consulted on national security issues). Today, the list would also include the Department of Homeland Security, but DHS did not exist in 1995. *See* Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135 (2002) (creating DHS).

[196] 163 F.3d 855, 859 (4th Cir. 1998).

cut off the shipment of goods intended for Iran."[197] Because Ehsan's goal was to "seek a market in Iran," his shipment constituted an "exportation" to Iran.[198] That is, the court interpreted the executive order so as to most effectively carry out its apparent purpose. But once we recognize that presidents often issue compromise orders, courts have good reason to hew closely to the limitations embodied in the text.

In sum, I argue that courts should respect the President's power to issue a less-than-effective order—and let the President correct any "mistakes" himself. As it turns out, President Clinton did later revise the executive order at issue in *Ehsan* to broaden the ban on reexportations.[199] I return to the importance of revised directives below.

b. Toothless Directives. Presidents may also opt, after consultation, to issue directives that do very little at all. Clinton's executive order on children's environmental health illustrates this point. After agencies repeatedly expressed concerns about lawsuits, and the extent to which the new directive might be in tension with other commitments (like the legality of tobacco), Clinton decided to "ease [the] burden a bit'" and issued a watered-down directive.[200] The ultimate order instructed agencies to act only "to the extent permitted by law" and only as "appropriate, and consistent with the agency's mission."[201]

Some readers might think that presidents always "hedge their bets" in directives in order to stave off legal challenge, and thus always include qualifiers like "to the extent permitted by law." But that is not the case. For example, the executive order in *Ehsan* (Clinton's Executive Order 12959) "*prohibited*…the exportation" of certain products "from the United States to Iran," without such qualifiers.[202] Likewise, President Trump's second and third travel bans—which, by all accounts, were subject to a more extensive consultation process than the first[203]—

---

[197] *Id.*

[198] *Id.* at 857-59. The court asserted that its interpretation was consistent with the text of the directive. Throughout history, the court stated, "'exportation' has consistently meant the shipment of goods to a foreign country with the intent to join those goods with the commerce of that country." *Id.* at 858. Under this view, the executive order barred the "exportation" of any goods headed (ultimately) for Iran. But throughout this analysis, the court failed to explain how this definition might differentiate an "export" from a "reexport" to Iran.

[199] The subsequent order would clearly have covered Ehsan's conduct. *See* Exec. Order No. 13059, § 2, 62 Fed. Reg. 44531, 44531 (Aug. 21, 1997) (prohibiting "the exportation, reexportation…directly or indirectly, from the United States, or by a United States person…of any goods…to Iran…, including the exportation, reexportation….undertaken with knowledge or reason to know" "such goods…are intended" for Iran).

[200] Rudalevige, *supra* note 106, at 144; *see* Part III(B)(1)(b).

[201] Exec. Order 13045, § 1, 62 Fed. Reg. 19885, 19885 (April 21, 1997).

[202] Exec. Order No. 12959, §1(b), 60 Fed. Reg. 24757, 24757 (May 8, 1995). There were likewise no such qualifiers in the revised directive. *See* Exec. Order No. 13059, § 2(a) 62 Fed. Reg. 44531, 44531 (Aug. 21, 1997).

[203] *See* Steve Holland & Julia Edwards Ainsley, *Trump signs revised travel ban in bid to overcome legal challenges*, REUTERS (March 6, 2017); *see also* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive*

"*suspended*" the entry of designated individuals.[204] There was no qualifying language attached to those suspensions.[205]

This analysis has important implications for recent litigation over President Trump's executive order on funding for sanctuary cities. One of the central questions is whether the order does anything at all.[206] Executive Order 13768 provides: "[T]he Attorney General and the Secretary [of the Department of Homeland Security (DHS)], *in their discretion and to the extent consistent with law*, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary."[207] The order further states that "[t]he Secretary has the authority to designate, *in his discretion and to the extent consistent with law*, a jurisdiction as a sanctuary jurisdiction."[208]

Notably, this question of meaning is preliminary to the challenging constitutional questions in the case. As the plaintiff localities have argued,

---

Legal Process, 127 YALE L.J.F. 825, 839 (2018) ("[b]y all accounts, EO-3 appears to have gone through at least some review").

[204] Protecting the Nation From Foreign Terrorist Entry Into the United States, Exec. Order 13780, §2(c), 82 Fed. Reg. 13209, 12213 (March 6, 2017) (suspending entry subject only to specified limitations, waivers, and exceptions); *see* Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats, Procl. 9645, §2, 82 Fed. Reg. 45161, 45165-67 (Sept. 24, 2017) ("The entry…of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers").

[205] Notably, *other* provisions of the second travel ban contained the "to the extent permitted by law" qualifier. But the "suspension of entry" provision did not. *See* Exec. Order 13780, §6(d), 82 Fed. Reg. 13209, 12216 (March 6, 2017) ("It is the policy of the executive branch that, *to the extent permitted by law and as practicable*, State and local jurisdictions be granted a role in the process of" refugee resettlement); *id.* § 9(b), 82 Fed. Reg. at 13217 ("*To the extent permitted by law* and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program"). The third travel ban contained no such qualifier in any section.

[206] Another issue was whether the Attorney General could "clarify" the order via memorandum. *See* Office of the Attorney General, Memorandum for All Department Grant-Making Components: Implementation of Executive Order 13768. For reasons discussed in connection with the first travel ban, I do not believe that the Attorney General could contradict the plain text of the order. *See* Part IV(B)(1). Although the President can delegate some functions to high-level officials by directive, the government has not suggested that the Attorney General sought to exercise any such delegated power. *See supra* note 180. The more challenging question in these cases is what the text means.

[207] Enhancing Public Safety in the Interior of the United States, Exec. Order 13768, § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (emphasis added); *see also id.* at §2(c), 82 Fed. Reg. at 8799 ("It is the policy of the executive branch to…[e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, *except as mandated by law*.") (emphasis added). Under the statute, state and local government entities may not prohibit their officials from sharing with federal officials "information regarding the…immigration status" of an individual. 8 U.S.C. § 1373(a). Notably, a federal court recently found the statute itself unconstitutional. *See* City of Philadelphia v. Sessions, 309 F.Supp.3d 289, 329-31, 344-45 (E.D. Pa. 2018).

[208] Exec. Order 13768, § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (emphasis added).

if Executive Order 13768 requires the Attorney General and DHS Secretary to strip federal grants from localities, the President has arguably usurped Congress's power under the Spending Clause, thereby transgressing the constitutional separation of powers, and commandeered localities in violation of the federalism principles underlying the Tenth Amendment.[209]

That may be precisely why the executive order is couched in qualifiers. As officials told me, during the interagency consultation process, agency officials will often point out if a proposed directive seems to violate a federal statute, regulation, or the U.S. Constitution. Likewise, OLC review is focused on such questions of legality.[210] Of course, we do not know that the order went through much review; it was issued in the early days of the administration. Nonetheless, even a brief review could have uncovered these troubling issues.

In a recent opinion on Executive Order 13768, a court of appeals majority found it implausible that the President had issued a toothless directive. The court declared that any such interpretation "strains credulity."[211] After all, the court emphasized, "Section 9(a) orders 'the Attorney General and the Secretary' to 'ensure that [sanctuary jurisdictions]…are not eligible to receive Federal grants."[212] The court discounted the "as consistent with law" qualifiers.[213] A narrow reading, the court emphasized, would be at odds with the "object and policy" of the order—as reflected in public statements by the administration.[214] "The President himself stated that he would use defunding as a 'weapon'" against sanctuary cities, and the White House Press Secretary reiterated that "President Trump would 'make sure that...counties and other institutions that remain sanctuary cities don't get federal government funding.'"[215]

Dissenting, Judge Ferdinand Fernandez suggested that his colleagues had too quickly "shunt[ed] aside" the "consistent with law"

---

[209] *See* City and County of San Francisco v. Trump, 897 F.3d 1225, 1231, 1234-35 (9th Cir. 2018) (concluding that the order violated separation of powers principles); Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507, 530-36 (N.D. Cal. Apr. 25, 2017) (finding separation of powers, federalism, and due process violations).

[210] *See supra* Part III(B).

[211] City and County, 897 F.3d at 1238.

[212] The court emphasized that Executive Order 13768 exempted funds "deemed necessary for law enforcement purposes" and concluded that the order must apply to—and require the Attorney General and DHS Secretary to take away—all other funds from designated "sanctuary cities." *Id.* at 1239.

[213] *Id.* at 1239-40 (concluding that "the Executive Order unambiguously commands action" and its "savings clause does not and cannot override its meaning").

[214] *Id.* at 1242-43 ("If we look beyond the text of the Executive Order, the Administration's position becomes considerably weaker.").

[215] *Id.* at 1243; *see also* Daniel Simon and Jesse Marx, *Trump: Feds may defund Calif. over sanctuary-state push*, USA TODAY (Feb. 6, 2017) (the President stated: "Well, it's a weapon. I don't want to defund the state or a city." but "[i]f they [are] going to have sanctuary cities, we may have to do that. Certainly, that would be a weapon.").

phrases in the executive order.[216] "[I]f there is ambiguity in certain parts of the Executive Order, it is not at all ambiguous in its use of the restrictive language."[217] "To brush those words aside as implausible, or boilerplate, or even as words that would render the Executive Order meaningless was just to say that the plain language of the Executive Order should be ignored in favor of comments made dehors."[218]

The litigation over Executive Order 13768 illustrates the importance of considering presidential directives as a distinct area of interpretive inquiry. Although this Article does not aim to resolve all the issues in these cases, the analysis here should offer guidance on the question of meaning. First, once we consider the interagency consultation process, it becomes quite plausible that the President issued a directive that did not match his ideal policy. Although the President may have wanted to "use defunding as a 'weapon'" and hoped sanctuary cities would not "'get federal government funding,'"[219] the directive he issued is far more muted. The directive is couched in qualifiers, instructing the Attorney General and DHS Secretary to act only "to the extent consistent with law."[220] Moreover, not all presidential directives—including not all directives issued by the Trump administration—contain similar qualifying language.[221] That fact alone makes the "consistent with law" language in Executive Order 13768 seem more significant.[222]

It is also quite plausible that the President issued a largely toothless directive. During the interagency consultation process, the President may have been advised that, however much he might want to, he lacks the power to defund localities. (Notably, in that event, neither the Attorney General nor the DHS Secretary could legitimately rely on the order to take away federal grants.[223]) As Judge Fernandez put it, "whatever the President, or others, might wish for in order to achieve what they deem to be a more perfect polity," the executive order seems to "recognize[] their limits in achieving that."[224]

---

[216] City and County of San Francisco v. Trump, 897 F.3d 1225, 1249-50 (9th Cir. 2018) (Fernandez, J, dissenting) (describing the qualifiers as "short but clear and extraordinarily important wording in the Executive Order"); *see also id.* at 1247-48 (finding the localities' claims to be unripe).

[217] *Id.* at 1249-50.

[218] *Id*. at 1249.

[219] *Supra* note 215 and accompanying text.

[220] Exec. Order 13768, § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

[221] *See supra* notes 204-205 and accompanying text.

[222] Although one can debate the relevant "context" for purposes of textual analysis, this Article assumes that context includes other presidential directives (at least those issued by the same administration). *See supra* note 16 and accompanying text.

[223] Notably, the Attorney General has repeatedly failed in his attempts to rely on other sources of legal authority to defund sanctuary cities. *See* City of Chicago v. Sessions, 888 F.3d 272, 283-87, 293 (7th Cir. 2018) (holding the Attorney General lacked statutory authority); City of Phila. v. Sessions, 280 F. Supp. 3d 579, 658-59 (E.D. Pa. 2017).

[224] City and County of San Francisco v. Trump, 897 F.3d 1225, 1248 (9th Cir. 2018) (Fernandez, J, dissenting).

C. The Institutional Setting of Presidential Directives

This Article has emphasized that any theory of interpreting presidential directives must focus on both Article II and the institutional setting of the presidency. A few features of that institutional setting buttress this Article's case for textualism. Indeed, textualism may have more appeal in this context than it does in the statutory realm.

1. The Relevance of Publicly-Available Statements

As the sanctuary cities litigation illustrates, one question that courts face is determining whether to rely on extra-textual evidence to inform the meaning of a presidential directive. I argue that the existence of the interagency consultation process casts considerable doubt on the utility of such evidence.

Notably, extra-textual evidence is often not even available. Indeed, presidential directives differ from statutes and regulations in part because there is typically no "executive history" or other administrative record.[225] The Office of Management and Budget does keep a file on executive orders and proclamations but generally does not release those files until many years after a directive is issued (if at all).[226] And OMB likely has no information about the agency review process for other directives. Accordingly, in most cases, a court will have no executive history, even if it presumed that such materials might shed light on the interpretive inquiry. Although this Article does not rely heavily on the point, the lack of executive history does provide a functional reason for courts to adopt a textualist approach to presidential directives.

The more important question, in my view, is what courts should do with the extra-textual material that *is* available. After all, as the sanctuary cities litigation illustrates, even if there is no "executive history," a court may be able to look at public statements by the White House press secretary, or even comments by the President himself.

I argue that the very existence of the interagency consultation process casts doubt on the utility of such "outside comments" to discern the meaning of a directive.[227] The President may have an incentive to take

---

[225] Each house must "keep a Journal of its Proceedings, and from time to time publish the same." U.S. CONST. art. I, § 5, cl. 3. Although some jurists worried in the early-twentieth century about the public availability of legislative history, there is no question that lawyers today can access that material. *See* Nelson, *supra* note 71, at 367.

[226] *See* Rudalevige, *supra* note 106, at 147-48 (as of his 2012 article, "some executive order files [were] available up to late 1987"). Some materials may be accessible via a Freedom of Information Act request, but such proceedings can be lengthy. Even if the materials were available, much of the file would be of limited value, given that the President does not see the bulk of the agency comments. The most valuable document would be the memo that the President receives along with the text, providing an overview of the interagency debate. It is unclear whether that document is typically in the OMB file. *See* Part III(B) (describing the documents that go to the President).

[227] To be clear, this Article focuses on the meaning, not the validity, of presidential directives. It is a separate question whether public statements by the President are relevant to an analysis of constitutionally impermissible motive. *See supra* note 168.

a strong stand in the public sphere, as when President Trump threatened to "use defunding as a 'weapon'" against sanctuary cities.[228] Yet behind closed doors, the discussions may look very different—as officials raise concerns about the legality or wisdom of a proposed action. Ultimately, the President may opt to sign a compromise or even toothless directive—one that does not reflect his ideal position. Courts give effect to that presidential decision by adhering to the text of the directive that the President has designated as law.

2. Updating Directives

Statutory textualists "often respond to accusations that their interpretations lead to unwise or unjust results by insisting that 'if Congress doesn't like it, Congress can fix it.'"[229] But such arguments seem insensitive to the very bicameralism and presentment process that textualists themselves emphasize. Because of the veto gates of the statutory process, it may be very challenging to amend a law in response to a judicial decision.[230]

By contrast, presidential directives appear to be easier to revise.[231] Notably, two months after President Wilson granted the "blanket pardon" at issue in *De Kay v. United States*, he realized that he might have gone a bit overboard and issued a "clarifying" proclamation.[232] The new directive stated that the pardon applied *only* to individuals whose sentences had been "illegally suspended"—that is, those affected by the Killits decision.[233] Likewise, President Clinton closed the (apparent) "loophole" in *Ehsan* by broadening the ban on "reexportations."[234] President Trump has revised his travel ban twice.[235]

That is not to say it is always easy to revise a presidential directive. Presidents Reagan and George H.W. Bush utterly failed in their attempts to revoke Lyndon Johnson's Executive Order 11246 (barring discrimination and requiring affirmative action by government

---

[228] *Supra* note 215 and accompanying text.

[229] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 58 (2d ed. 2013).

[230] *See, e.g.*, Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 504-05 (2014) (doubting on this basis textualists' "contention that legislatures generally can cure misinterpretations by courts").

[231] Political scientist Sharece Thrower has shown that around half of the executive orders issued between 1937 and 2013 have been modified in some way. *See* Sharece Thrower, *To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 AM. J. POL. SCI. 1, 2-3 (2017) ("[o]f the 6,158 executive orders issued between 1937 and 2013, 18% are amended, 8% are superseded, and 25% are revoked").

[232] Defining Pardon and Amnesty Proclamation Dated June 14, 1917, *in* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8318-19 (August 21, 1917).

[233] *Id.* (the pardon should apply "to no other[]" defendants); *see also supra* Part II(B) (discussing *De Kay*). It is unclear whether Wilson acted in response to the *De Kay* case.

[234] *See supra* note 199 and accompanying text. It is unclear whether the Clinton administration was prompted by the *Ehsan* case.

[235] *See* Procl. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017); Exec. Order 13780, 82 Fed. Reg. 13209 (March 6, 2017).

contractors).[236] As discussed, presidents assume that revisions are subject to the same interagency consultation process as initial orders; and sometimes that process leads a President to issue no directive at all. Yet the complexity of the process still pales in comparison to the veto gates of the bicameralism and presentment process of Article I.[237] Accordingly, to the extent a President concludes that a court has "erred" in its understanding of a given directive, the President can more readily respond.[238] In short, some of the concerns with textualism in the statutory context seem to be less pressing here.

V. A SELF-IMPOSED CONSTRAINT ON PRESIDENTIAL POWER

The Opinions Clause of Article II empowers the President to seek out advice from his subordinates—to invite them to help him ensure the faithful execution of the laws. Since at least the 1930s, presidents have exercised that power to create a robust interagency consultation process for presidential directives. Agency officials often spend weeks or months debating the legal and policy details of the text. And at the end of this process, the President may well opt for compromise. The federal judiciary, I argue, can best give effect to the structure the President has created under Article II—with its potential for compromise and less-than-effective policy—by adhering to the text of a directive.

But this argument also has broader implications. Through the interagency consultation process, presidents have opted to place a constraint on their own power. This Part first explores why presidents may have crafted such a check, and then suggests how the analysis here connects to theories of the constitutional separation of powers.

A. Structural and Political Incentives

It may seem surprising that presidents would, in effect, tie their own hands through the process for issuing directives. But presidents have various structural and political incentives to rely on their subordinates. First, as a practical matter, presidents do not have time to draft (perhaps any) directive. So they must rely on subordinates to do the writing.

---

[236] *See* Part III(B)(1)(b).

[237] *Cf.* Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 & n.5 (1992).

[238] Notably, I have not found empirical work specifically addressing presidential overrides of judicial decisions. Accordingly, I have no direct comparison to the literature on congressional overrides. *See, e.g.*, Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1319-20 (2014) (finding that the 1990s was "the golden age of overrides," and "overrides declined…dramatically" after 1998). Nevertheless, given the empirical work suggesting that presidents often modify directives (with or without a court decision), it seems quite plausible that presidents would have an easier time responding to judicial decisions. *See supra* note 231 (discussing recent political science literature on presidential revocations of executive orders).

Second, presidents are generalists; they do not have expertise in the myriad areas in which presidents issue directives—ranging from proclaiming national monuments,[239] to overseeing government procurement contracts,[240] to barring financial transactions involving threatening foreign powers.[241] Presidents thus rely on subordinates (often, from multiple agencies) who have expertise in a given area.

The Opinions Clause seems specifically designed to provide the President with such expert advice. The Clause empowers the President to demand from his principal Officers a written opinion "upon any Subject relating to the Duties of their respective Offices"—that is, matters on which those officers are more likely to have expertise.[242] Moreover, the consultation among agencies increases the level and amount of expertise—and may lead to better policy (although that is by no means guaranteed).[243] As Neal Katyal has suggested, "[w]hen the State and Defense Departments have to convince each other of why their view is right…better decision-making" may result.[244]

Third, the President may conclude that listening to his subordinates—and respecting their wishes—will increase their willingness to implement presidential policies. This point relates to a structural reality of the presidency: "[T]he President alone and unaided [cannot] execute the laws. He must execute them by the assistance of

---

[239] *See* Antiquities Act of 1906, 34 Stat. 225 (codified at 54 U.S.C. § 320301(a)).

[240] *See* Federal Property and Administrative Services Act of 1949, Pub. L. 81-152, 63 Stat. 377 (codified at 40 U.S.C. §§ 101, 121) (together, providing that "[t]he President may prescribe policies and directives" to ensure "an economical and efficient" procurement system).

[241] *See* International Economic Emergency Protect Act (IEEPA), Pub. L. No. 95-223, 91 Stat. 1626, §§ 202, 203 (Dec. 28, 1977) (codified at 50 U.S.C. §§ 1701, 1702) (the President may bar transactions with foreign countries that present "an unusual and extraordinary threat").

[242] U.S. CONST. art. II, § 2, cl.1. As discussed, I assume that the President has discretion to determine which "Subject[s]" relate to an official's duties. *See supra* note 90.

[243] Interagency consultation does not ensure good decisions. Although one can debate what qualifies as a "good" decision, I suspect virtually everyone today would agree that Franklin Roosevelt's Executive Order 9066 falls outside that category. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the exclusion of "any person" from designated "military areas"). The order led to the internment of over 120,000 persons of Japanese ancestry, including 70,000 U.S. citizens. *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 108-09 (2001). As Amanda Tyler recounts, when the Roosevelt administration debated the draft order, Attorney General Francis Biddle repeatedly asserted that the federal government could not detain citizens, without a formal suspension of the writ of habeas corpus. But the Attorney General lost that interagency battle and ultimately "capitulated." *See* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME 224-27 (2017); *see also* supra notes 111-112 and accompanying text (from the 1930s on, executive orders were reviewed by the Attorney General for "form and legality").

[244] Katyal, *supra* note 15, at 2317.

subordinates."[245] Although many theories of Article II rest on the assumption that subordinates always do what the President says, some political scientists are starting to question that assumption.[246]

That research is still in the early stages. For present purposes, it is enough that the President himself may worry about implementation.[247] In 2007, Clinton complained that he was "frustrated" during his presidency because "I'd issue all these executive orders" and could "never be 100 percent sure that they were implemented."[248] As Rudalevidge suggests, a President may conclude that "[a]n agency that writes the orders…is surely more likely to carry them out."[249]

Finally, the President may rely on the interagency consultation process to avoid embarrassing (and perhaps politically costly) mistakes. Several of the officials I interviewed volunteered this point as the single most important reason for a President to engage in consultation. As one official put it, the process not only constrains but also "protects the President."[250]

B. A Different Type of Check

Whatever the reason, it is clear that presidents have invited subordinate officials to play a key role in crafting presidential directives. And at the end of this interagency consultation process, presidents have issued directives that do not fully advance the President's preferred policy. Instead, the President often opts to split the difference among agencies or

---

[245] *See* Myers v. United States, 272 U.S. 52, 117 (1926); Wilcox v. Jackson, 38 U.S. 498, 513 (1839) ("The President speaks and acts through the heads of the several departments").

[246] *See* Joshua B. Kennedy, *"'Do This! Do That!' and Nothing Will Happen": Executive Orders and Bureaucratic Responsiveness*, 43 AM. POL. RESEARCH 59, 61 (2015) (finding that agencies "sometimes" obey executive orders and that "the conditions under which agencies will forego responding to a presidential directive are multi-faceted"); *see also* Rudalevige, *supra* note 106, at 156-57 ("If agencies are told, 'do this,' do they 'do that'?…We don't know, as yet").

[247] *Cf.* William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRES. STUD. Q. 417, 433-36 (2005) (noting "[a]ll presidents…struggle to ensure that those who work below them will faithfully follow orders").

[248] Andrew Rudalevige, *The Administrative Presidency and Bureaucratic Control: Implementing a Research Agenda*, 39 PRES. STUD. Q. 10, (2009) (quoting Clinton's statement).

[249] Rudalevige, *supra* note 106, at 157. A few officials I interviewed found this view plausible. *See* Bies Interview, *supra* note 8 (asserting that presidents consult with agencies in part because "you need 'buy in'" from officials who will implement the directive); *see also* Egan Interview, *supra* note 8 (stating that agency officials would not likely "flout" a presidential directive but might resist it by stating the "document is 'so flawed' that they can't adhere in current form").

[250] Bies Interview, *supra* note 8 (asserting that the process "protects the President as much as it does" any agency); Gray Interview, *supra* note 8 (stating that "if process weren't followed, you can have problems" and that can lead to "embarrassment" for the president).

substantially "soften" a directive. In this way, the interagency consultation process serves as a constraint on presidential power.

The process appears to be an example of what Katyal has dubbed the "internal separation of powers."[251] Notably, Katyal has emphasized the role of career civil servants. As he explains, the complex bureaucracy—replete with government officials who serve from administration to administration—can push back on "presidential adventurism."[252]

The analysis here suggests a different kind of internal check. Presidents themselves have invited the constraint—and not primarily from career civil servants but rather from political appointees.[253] The Opinions Clause, of course, is focused on those "principal Officers,"[254] and those officials seem to have the most influence over the crafting of presidential directives. When the President weighs in during the agency review process, he does so at the request of a Cabinet member or other top official.[255] That should perhaps not be surprising; a lower-level official is far less likely to have the President's ear. And although many officials may be invited to comment on a directive, the President hears primarily about the "high-level" views of, for example, Cabinet members.[256] As I have suggested, the President may be willing to listen to these officials, in part because he selected these "principal Officers" for their positions.[257] So when these officials disagree with one another, they can at times push the President toward compromise.

Scholars have become increasingly interested in such subconstitutional constraints on presidential power. That is in part because many commentators have lost confidence in Congress's capacity

---

[251] *See* Katyal, *supra* note 15, at 2318 ("outlin[ing] a set of mechanisms that create checks and balances within the executive branch").

[252] *See id.* at 2317-18 ("Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview."). Along similar lines, Jon Michaels has recently emphasized that the federal bureaucracy may serve as a check on political appointees. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 543-47 (2015) (the civil service has "institutional, cultural, and legal incentives to insist that agency leaders follow the law…and refrain from partisan excesses.").

[253] Notably, both Katyal and Jon Michaels are skeptical about the capacity of political appointees to constrain presidential power. The analysis here suggests that political appointees can perform that function when the President invites the constraint. *See* Michaels, *supra* note 252, at 538-40 ("there is reason to expect agency leaders to promote their boss's initiatives"); *see also* Katyal, *supra* note 15, at 2332-33 (2006) (expressing concern about the rising "number of political actors in agencies" who serve for short periods and may lack the competence of career bureaucrats).

[254] U.S. CONST. art. II, § 2, cl.1.

[255] *See* Part III(B)(1)-(2).

[256] *See id.*

[257] *See* U.S. CONST. art. II, § 2, cl.2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint…Officers of the United States"); Part III(A).

to serve as a reliable "check," at least when the House, Senate, and President are controlled by the same political party.[258] So scholars have suggested alternative mechanisms for providing the "checks and balances" envisioned by the Madisonian scheme of separated powers. For example, Eric Posner and Adrian Vermeule have argued that politics and public opinion place important limits on what the President can do.[259] Jack Goldsmith and Gillian Metzger have argued that the President is constrained by a variety of forces, including the other branches, the bureaucracy, and external groups like the press, lawyers, and nonprofit organizations.[260]

This Article adds a "self-imposed" check to the mix. Through the interagency consultation process, presidents have placed a constraint on their own unilateral action. Accordingly, presidential directives turn out to be less unilateral than one might have anticipated—at least under the system presidents have developed since the 1930s.

C. The Contingency of the Interpretive Method

This final point leads me to an important observation, which further underscores the distinction between statutory and presidential textualism. Many statutory textualists argue that their method derives from the bicameralism and presentment process of Article I.[261] Under that view, statutory textualism is baked into the constitutional scheme.

The case for textualism in the context of presidential directives is different. Article II does not, standing alone, call for a textualist approach. Instead, the case for textualism depends on the manner in which the President has exercised his Article II power. The Opinions Clause invites the President to seek out advice from his subordinates. Pursuant to that authority, presidents have created a complex scheme for issuing directives,

---

[258] *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329 (2006) ("[W]hen government is unified…we should expect interbranch competition to dissipate."); *accord* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1809–10 n.222 (2007); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 479 (2008). Some scholarship has questioned the premises of the "separation of parties" critique. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 28-35 (2017) (urging that each house of Congress does at times protect its institutional interests, and also making the deeper point that cooperation during periods of unified government may be "a feature of the American governing system, not a bug," if it reflects the wishes of the public); David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 5 (2018) ("the behavior of federal officials cannot always be explained simply by partisan or ideological motives").

[259] *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 4-5, 18, 12-13 (2010) (stating that these constraints include elections, public approval ratings, and presidential concerns about long-term legacy).

[260] *See* JACK GOLDSMITH, POWER AND CONSTRAINT x-xvi, 209 (2012) (arguing that these forces not only constrain the President but have also legitimated the growth in presidential power); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 77-85 (2017).

[261] *See supra* Part II(C).

relying on agency officials to draft, redraft, and bargain over the content of directives. At the end of this process, the President often opts for compromise among competing agency views. Courts, I argue, best give effect to that presidential decision by hewing closely to the text.

Article II thus invites, but does not require, the President to create this interagency consultation scheme.[262] Nor does Article II demand that the President opt for compromise. The existing scheme for crafting presidential directives, like many other aspects of administrative governance, depends on a mix of political incentives, norms, and conventions, rather than legal requirements.[263] Accordingly, in contrast to prominent theories of statutory interpretation, this Article's case for textualism is contingent.

This point underscores the extent to which interpretive theory turns on both constitutional law and institutional setting. A significant change in institutional design may call for a different interpretive approach. For now, however, courts should recognize that presidents have for a mix of reasons opted to tie their own hands. Courts show respect for that presidentially created scheme—with its potential for compromise and less-than-effective policy—by adhering to the text.

VI. CONCLUSION

Theories of interpretation depend on both constitutional law and institutional setting. For statutes, the focus is properly on Article I and the other rules and procedures governing Congress. By contrast, for presidential directives, the emphasis must be on Article II and the institutional mechanisms of the presidency. This Article contends that both the constitutional structure and that institutional setting point toward textualism. But whether or not one accepts that conclusion, the theoretical point holds. Any theory of interpreting presidential directives should begin with Article II. Contrary to the assumption of federal courts for over a century, presidential directives should not be treated like statutes.

---

[262] *See* U.S. CONST. art. II, § 2, cl.1 ("[The President] *may* require the Opinion, in writing" of officials) (emphasis added); *supra* Part III(A).

[263] *See supra* Part V(A) (explaining why the President consults with officials); *cf.* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2221-30 (2018) (describing a "deliberative-presidency norm" that "requires a considered, fact-informed judgment in certain decisional domains"); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165-67 (2013) (emphasizing "the role of conventions in creating and protecting agency independence").