POLICING EXECUTIVE TEAMWORK: RESCUING THE APA FROM PRESIDENTIAL ADMINISTRATION

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The Administrative Procedure Act does not apply to the President. In place of the well-known and well-defined procedural and substantive requirements of the APA, a more limited "nonstatutory" form of judicial review governs the President's exercises of statutory authority. Scholars have devoted many pages to debating what form "nonstatutory" review of Presidential actions should take. But the President rarely acts alone. In the era of Presidential Administration, our nation's chief executive spends much of his time telling bureaucrats what to do. In that context, this paper takes up an essential predicate question: When the President acts with or through an agency, how should a court distinguish between presidential actions that are exempt from the APA and agency actions to which the APA applies? This paper is the first to answer this important question.

A comprehensive study of the caselaw reveals a split. The "last act" camp views the rule that the APA doesn't apply to the President primarily as a matter of finality. Unless the President takes the last action in a sequence, the APA applies. The "presidential nature" camp views the rule as more broadly tied to separation of powers, such that any action that is presidential in nature (however that may be defined) is exempt from the APA.

This paper argues that while the former approach is overly formalistic and may undermine the President's authority, the latter approach poses an existential threat to the existing regime of judicial review for agency action. As the President increasingly exerts control over agencies, many significant executive branch actions start to look "presidential," which could in turn limit judicial oversight. In order to save the APA from Presidential Administration (as well as from Unitary Executive theories), this paper argues that the President's APA exemption should be limited to his direct actions under statutes that delegate authority to him by name. Otherwise, the APA should apply to agency actions, regardless of the President's involvement. At the same time, courts applying "hard look" review of agency action should give greater leeway to political input from the Executive. This will balance the desire for agencies to be politically accountable to the President with the fundamental requirement that agencies act in accordance with law.

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INTRODUCTION

On November 20, 2014, Barack Obama delivered a televised address to the nation about immigration.[1] After the failure of comprehensive immigration reform legislation in 2013,[2] the President announced that he would act pursuant to his own authority to make our "broken" immigration system "more fair and more just."[3] Among the reforms he announced was a program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), although he did not use that clunky title in his speech.[4] Instead, he pitched the program as needed "to deal responsibly with the millions of undocumented immigrants who already live in our country."[5] He said that immigration enforcement should target "felons, not families" and "criminals, not children."[6] For undocumented immigrants who had been in the country for more than five years, who had children who were citizens or lawful permanent residents, and who could pass a criminal background check, he offered a "deal": they could "stay in this country temporarily without fear of deportation[,] . . . come out of the shadows[,] and get right with the law."[7]

The President's speech made it crystal clear who was making these changes: President Obama himself. He described the programs as "actions I have the legal authority to take as President."[8] He doubled down on the point throughout the speech: "The actions I'm taking are not only lawful, they're the kinds of actions taken by every single Republican President and every single Democratic President for the past half century."[9] The press coverage attributed the actions to the President. The headline in the *New York Times*

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[1] President Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2019), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

[2] Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013), https://www.congress.gov/bill/113th-congress/senate-bill/744.

[3] Obama, *supra* note 1.

[4] *Id.* DAPA was meant to build on the success of its predecessor program, Deferred Action for Childhood Arrivals (DACA), which protected immigrants known as "Dreamers" who had come to the country as kids and met certain criteria, such as seeking education or serving in the military. *See* Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs and Border Patrol, et al. (June 15, 2012).

[5] Obama, *supra* note 1.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

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read, "Obama, Daring Congress, Acts to Overhaul Immigration."[10]

But the policy memo announcing DAPA, issued that same day, was not an executive order. Instead, Secretary of Homeland Security Jeh Johnson announced DAPA in a memorandum to his subordinates.[11] In the parlance of administrative law, this was "guidance." When Texas sued to stop DAPA, it argued that the policy had not complied with the Administrative Procedure Act's notice and comment requirements for legislative rules.[12] Principally on that basis, the Firth Circuit upheld an injunction against the program,[13] and the Supreme Court affirmed by an equally divided court.[14]

The result might have been different if President Obama had just announced DAPA on his own letterhead. That's because in *Franklin v. Massachusetts*, the Supreme Court held that the APA does not apply to the President.[15] Instead, Presidential actions are subject to what's known as "nonstatutory" review.[16] The exact contours of nonstatutory review are the subject of much scholarly and jurisprudential debate.[17] At a minimum, it includes review for whether the President's action was unconstitutional or totally without statutory authorization. It likely does not encompass any "hard look" review for whether the action is arbitrary and capricious. And it certainly does not impose any procedural requirements, like the APA's notice and comment process. If DAPA had been an executive order, it might have been invalidated on some other ground, but it would not have needed to go through notice and comment.

This seems like an absurd result. The legal regime that applies to an

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[10] Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014) https://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html.

[11] Memorandum from Jeh Johnson, Sec'y, Dept. of Homeland Sec., to Leon Rodriguez, Director U.S. Citizenship and Immigration Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014),
https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf.

[12] The difference between rules and guidance is beyond the scope of this paper. But the basic argument was that guidance must be nonbinding, and DAPA was not as flexible as it appeared on its face. *See* Texas v. U.S., 86 F. Supp. 3d 591 (S.D. Tex. 2015).

[13] Texas v. U.S., 809 F.3d 134 (5th Cir. 2015). The Fifth Circuit also purported to enjoin the program because it was inconsistent with the Immigration and Nationality Act, but several other circuits have subsequently disagreed with that aspect of the holding. *See, e.g.*, Regents of the Univ. of Cal. v. Dep't. of Homeland Sec., 908 F.3d 476 (9th Cir. 2018); NAACP v. Trump, 298 F. Supp. 3d 209 (D.D.C. 2018).

[14] U.S. v. Texas, 136 S. Ct. 2271 (2016).

[15] 505 U.S. 788 (1992).

[16] Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)

[17] *See infra* Section I.C.

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executive action should not be determined by the name on the letterhead.[18] And yet, as this DAPA hypothetical illustrates, it is difficult to apply a binary rule to a nonbinary world. The APA applies to agencies; it doesn't apply to the President. That works fine at the poles of the spectrum, when the President or an agency act alone. But in an era of Presidential Administration, that is becoming an increasingly rare circumstance. What about the multitude of situations in which the President and agencies act together? Perhaps the President issues an executive order telling an agency how to exercise its statutory authority. Or the President might influence agency action in more subtle ways, by meeting with agency heads or through OIRA's cost-benefit analysis. Maybe Congress delegates authority to the President, who redelegates it to an agency. Or maybe Congress writes a statute with a mixed delegation, telling an agency to act with oversight from the President or the President to act through an agency. Does the APA apply in any of those situations? All? None?

Scholars have not provided an answer. The literature on Presidential Administration and the Unitary Executive Theory has championed greater presidential authority over the administrative state without much consideration of the implications for the APA. Elena Kagan's pathbreaking article championing greater political influence over the administrative state devotes only a paragraph and a footnote to the implications of her proposals for the scope of the President's APA exemption.[19] Kevin Stack has responded to Kagan with several articles arguing that the President's directive power over agencies should be far more constrained.[20] But he, too, has spent little time on how his proposals interact with *Franklin*. Likewise, the literature on how nonstatutory review should compare to APA review has largely ignored the predicate question of how to draw the line between those two review regimes.[21] In short, the academic literature often accepts the President's APA exemption without much interrogation of its limits and implications, instead focusing on the contours of nonstatutory review. This paper is the first to address the predicate question. It is also the first to comprehensively study the caselaw addressing this important issue.

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[18] As the DAPA anecdote demonstrates, the President is as politically accountable for some administrative actions as for certain presidential ones. Obama's speech gave him clear ownership of DAPA, regardless of who signed the paper.

[19] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2246, 2351 n.402 (2001).

[20] Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM L. REV. 263 (2006) [hereinafter Stack, *President's Statutory Powers*]; Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009) [hereinafter Stack, *Reviewability*]; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539 (2005) [hereinafter Stack, *Statutory President*].

[21] See *infra*, Section I.C.

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Courts have met the challenge with some confusion. The caselaw is split. Some courts, which I refer to as the "last act" camp, exempt the President from the APA only when he takes the final action in a sequence affecting the plaintiff's rights.[22] Other courts, which I call the "presidential nature" camp, exempt any action that is presidential in nature, however that might be defined, even when the agency is the primary actor and the President is only in the background.[23] In this paper, I argue that neither approach is appropriate. The "last act" approach arguably misreads *Franklin* and turns the President's APA exemption into an empty formality. Worse, the "presidential nature" approach poses an existential threat to the existing structure of American administrative law. As the President becomes more involved in directing agencies, his exemption from the APA could significantly reduce judicial review of executive actions, undermining the presumption of reviewability at the core of American administrative law.[24] The purpose of the APA was to ensure "broad" and "generous" judicial review of agency action.[25] That purpose will not be realized if presidential involvement is permitting to shield significant agency actions from APA review.

The risk is not theoretical. President Trump has issued Executive Orders at an unprecedented rate.[26] Many of those orders, especially those in the immigration context, simply direct agency heads on how to exercise their authorities. "The Secretary shall…"[27] As other scholars have noted, courts have struggled to decide what standards to apply in suits challenging those orders.[28] And after its win in *Trump v. Hawaii*, the government has argued in a recent brief that, at least in the immigration context, limited rational-basis review should apply instead of traditional APA arbitrary-and-capricious review even to a suit bringing APA claims against agency actions, because those actions were influenced by the President.[29] How far that argument can go is yet to be seen, but courts have struggled to delimit the scope of *Franklin v. Massachusetts* ever since it was decided.

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[22] *See infra*, Section II.A.

[23] *See infra*, Section II.B.

[24] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) ("[T]he Administrative Procedure Act . . . embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'")

[25] *Id.* at 140-141.

[26] https://www.cnn.com/2017/10/13/politics/donald-trump-executive-orders/index.html

[27] *See, e.g.*, Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (2017).

[28] *See* Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. (forthcoming 2019).

[29] Memorandum in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Motion to Dismiss, S.A. v. Trump, Case No. 18-CV-03539 LB (N.D. Cal. Oct. 11, 2018)

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In this paper, I argue that courts should apply the APA whenever an agency acts pursuant to its own statutory powers or exercises discretion that determines legal rights and obligations, regardless of the President's involvement. What matters is indeed the nature of the action, rather than any formalistic test based on finality or letterhead. But in accordance with Congressional intent, separation of powers, and traditional administrative law principles, the tie should go to the agency in determining whether the action is that of an agency or the President. At the same time, courts applying so-called "hard look" review of agency action should give greater leeway to political input from the Executive. This solution enforces the separation of powers by balancing the President's politically legitimizing influence over agency action with the rule of law value at stake in courts' ensuring executive fidelity to Congress's statutory directives.

Part II explains *Franklin v. Massachusetts*' binary rule and why it is a poor fit for the nonbinary world. It also explains the stakes of the choice between judicial review regimes by contrasting APA and nonstatutory review. Part III explains the current caselaw on what situations trigger the President's APA exemption. The lower courts are split, and the Supreme Court has been dodging the question for nearly 30 years. Part IV offers my middle-ground proposal, situates it within existing literature, and defends it from possible attack. Part V concludes.

I. BINARY RULE, NONBINARY WORLD

This Part begins in Section I.A with a discussion of *Franklin v. Massachusetts*, the case that created an exemption from the APA for the President. That case arose in a unique context, one in which the President is responsible for the final, discretionary act in a chain of administrative actions. The peculiar circumstances under which the case arose have caused problems for lower courts tasked with generalizing its holding to other factual scenarios. That Section further explores the somewhat vague separation of powers concerns that led the Court to exempt the President. It also discusses a couple of subsequent Supreme Court cases that might bear on how *Franklin* should be interpreted.

Section I.B then explains the various ways in which the President is involved in agency action (and that agencies are involved in presidential action), which complicates the seemingly simple rule that emerges from *Franklin*. In an era of Presidential Administration, the President's role in agency action has increased significantly. And this could give the President's APA exemption greater purchase.

I then turn in Section I.C to a brief discussion of the differences

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between APA and nonstatutory judicial review. If nonstatutory review largely replicated APA review, then the choice between them would be of fairly little consequence. Scholars have argued that nonstatutory review should approximate APA review in certain respects, but I will argue, as other scholars have, that nonstatutory review in its current form falls far short of APA review and is insufficient to hold the executive accountable for acting lawfully. For that reason, the choice between APA and nonstatutory review for joint agency-presidential actions is significant.

A. The Binary Rule

Franklin v. Massachusetts[30] concerned the statutory procedure through which the Department of Commerce creates the decennial census and, in turn, the President reports the census to Congress for the purposes of reapportioning seats in the House of Representatives, as required by the Constitution.[31] After more than a century of delay-causing fights over reapportionment, Congress acted in the early 20th Century to make the reapportionment process more self-executing.[32] They sought to create a system in which the number of Representatives would be determined by the Secretary of Commerce and the President without action from Congress itself.[33] The resulting statutory scheme calls for the Secretary of Commerce to take the census "in such form and content as he may determine."[34] The statute then instructs the Secretary to send the President a tabulation of total population by state as required for reapportionment within nine months of completion of the Census.[35] Then, the President "shall transmit" to Congress a statement of the population of each state, as determined in the Census, as well as the number of Representatives to which each state is entitled by the "method of equal proportions."[36] Once the President sends his report to

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[30] 505 U.S. 788 (1992).

[31] *Id.* at 794-96. The Constitution requires that Representatives "shall be apportioned among the several States . . . according to their respective Numbers," to be calculated by "actual Enumeration," conducted every 10 years, "in such Manner as [Congress] shall by Law direct." U.S. Const., Art. I, § 2, cl. 3.

[32] *Franklin* at 792.

[33] See S.Rep. No. 2, 71st Cong., 1st Sess., 2–3 (1929)

[34] 13 U.S.C. § 141(a). The Secretary has redelegated that authority to the Census Bureau, as the statute permits.

[35] 13 U.S.C. § 141(b) ("The tabulation of total population by States ... as required for the apportionment of Representatives in Congress ... shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.").

[36] 2 U.S.C. § 2a(a) (directing that the President "shall transmit to the Congress a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State

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Congress, the Clerk of the House of Representatives forwards it on to the states.[37]

Following the 1990 census, the State of Massachusetts sued the Secretary of Commerce and the President.[38] The state challenged the Secretary's decision, after much deliberation and some back and forth with Congress, to count overseas military personnel at their "home of record."[39] This decision cost Massachusetts a seat in the House.[40] As relevant here, the state argued that the Secretary's decision was arbitrary and capricious under the APA.[41] A three-judge district court panel agreed. It ordered the Secretary to "eliminate the overseas federal employees from the apportionment counts, directed the President to recalculate the number of Representatives per State and transmit the new calculation to Congress, and directed the Clerk of the House of Representatives to inform the States of the change."[42] The Supreme Court reversed.[43]

Justice O'Connor's opinion for the Court focused on the issue of finality. That is, the Court centered its analysis on whether the Secretary's reporting of the census results to the President was "final agency action," which is required to trigger APA review.[44] The Court held that under the statutory procedure, it is the President, not the Secretary, who takes the final action. Because the agency's action was not final, it was not subject to judicial review under the APA. The Court read the statute as allowing the President to amend the census data, because the text does not explicitly dictate that he must transmit the Secretary's report to Congress, but instead suggests the President is to generate his own statement of the state populations as determined in the Census.[45] That means the apportionment remains a "moving target" for the states even after the Secretary has reported the data to the President.[46] It is not until the President sends his calculations to Congress that "the target stops moving, because only then are the States entitled by [2 U.S.C.] § 2a to a particular number of Representatives."[47] Even if the apportionment calculation itself is ministerial, the President has

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would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions . . . .")

[37] 2 U.S.C. § 2a(b).

[38] Franklin v. Massachusetts, 505 U.S. 788, 794-96.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.* at 806.

[44] *Id.* The APA provides judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704

[45] *Franklin*, 505 U.S. at 797.

[46] *Id.*

[47] *Id.* at 798.

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discretionary authority to direct the Secretary to change the census, so legal rights are unsettled until the President makes his report.[48]

Perhaps adding to later confusion among the lower courts, the Supreme Court in *Franklin* emphasizes that the President's role in the process is "not merely ceremonial or ministerial," but the opinion doesn't say what the legal significance of that is. The Court does not say whether the case would come out differently were the President's involvement in fact determined to be ministerial. The implication at least is that were the President's role ministerial, then the Secretary's actions would determine legal rights and represent the end of the decision-making process. That would be final agency action, even if it weren't the last act in the chain.

Having determined that the final action was that of the President, the Court turned to the question of whether the APA applies to the President. It devoted only a single paragraph to this important question. The APA defines "agency" to include "each authority of the Government of the United States," with a list of exceptions that excludes from the definition Congress and the Courts but does not mention the President.[49] Even so, the Court observed that although the President is not explicitly excluded from the APA, "he is not explicitly included, either."[50] And given "the separation of powers and the unique constitutional position of the President," the Court refused to subject the President to the APA absent a clear statement from Congress that it intended to do so.[51] The President's actions could still be reviewed for compliance with the Constitution, but they "are not reviewable for abuse of discretion under the APA."[52] Thus, the "District Court erred in proceeding to determine the merits of the APA claims."[53]

Justice Stevens, joined by three other justices, concurred in part. He joined the Court's judgment because he thought the Secretary's actions satisfied the APA's requirements. But he disagreed that the Secretary's report to the President did not constitute final agency action.[54] Justice Stevens argued that "[t]he plain language of the statute demonstrates that the President has no substantive role in the computation of the census."[55] He took issue with the Court's conclusion that the statute does not prohibit the President from modifying the census results. Looking to the text of the statutory scheme, to the legislative history, and to the historical practice of Presidents, he found no evidence for the suggestion that the President was to

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[48] *Id.* at 799.
[49] 5 U.S.C. § 551.
[50] *Franklin*, 505 U.S. at 800.
[51] *Id.* at 800-01.
[52] *Id.* at 801.
[53] *Id.*
[54] *Id.* at 807 (Stevens, J., concurring in part and concurring in the judgment).
[55] *Id.* at 810.

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do anything other than receive the Secretary's report, make the apportionment calculation, and then transfer both the census data and apportionment calculation to Congress.[56] This suggests that, at least in the view of four justices, an agency's action can be final even when the President takes a later action, so long as that action is ministerial. Because Justice Stevens would hold that the agency's action was final, "it [was] unnecessary . . . to consider whether the President is an 'agency' within the meaning of the APA."[57]

Justice Scalia wrote a separate concurrence, primarily concerned with standing and, in the context of the redressability aspect of the standing analysis, remedies against the President. In that context, he addressed the possibility of obtaining judicial review of illegal acts of the President. First, Justice Scalia concluded that insofar as the District Court's order ran against the President, the Court had overstepped the separation of powers. He wrote succinctly: "I think it clear that no court has authority to direct the President to take an official act."[58] In this context, he briefly addressed how a person could still obtain judicial review of presidential actions: suits against subordinate officers who carry out the President's orders. "Review of the legality of Presidential action can ordinarily be obtained," Justice Scalia wrote, "in a suit seeking to enjoin the officers who attempt to enforce the President's directive."[59]

As discussed in more detail later in this paper, Justice Scalia's invocation of the officer suit has ambiguous implications for our debate about when the APA should apply. The officer suit is best known as a workaround for sovereign immunity. You can't sue the state of Minnesota, which enjoys immunity under the 11th Amendment, but under the doctrine of *Ex Parte Young*, you can sue the officers of the state who execute its laws.[60] One reading of Justice Scalia's concurrence is that there is absolutely no direct judicial review of the President's discretionary acts, and the only way to get even nonstatutory review is to sue a subordinate officer. (That would come as news to the many federal courts that have directly enjoined President Trump's executive orders.) Another reading is that a challenger can obtain APA review of presidential actions by waiting and suing the implementing agent or agency.

[56] *Id.*

[57] *Id.* at 816 n.15

[58] *Id.* at 826 (Scalia, J., concurring in part and concurring in the judgment). Scalia did leave open the possibility that the President might be enjoined to take a purely ministerial action. But he agreed with the majority that sending the census and apportionment figures to Congress was a discretionary, rather than a ministerial act.

[59] *Id.* at 828 (citing, inter alia, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[60] *See generally* Ex Parte Young, 209 U.S. 123 (1908).

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These two interpretations of Justice Scalia's concurrence illustrate the all or nothing problems generated by a binary rule. On the former reading, whenever the President orders an agency to act, he wipes out APA review. On the latter reading, the President's exemption from the APA is meaningless in the 99 percent of situations in which the President acts through an agent, because APA review can be obtained by simply waiting for a subordinate officer to carry out the President's orders. Finding middle ground between these poles while remaining faithful to *Franklin*'s premise that the President is exempt from the APA has proved difficult.

Before moving on, a few subsequent Supreme Court decisions that help frame *Franklin* merit at least brief mention. The Supreme Court affirmed the President's exemption from the APA and again held that an agency's action is not final when it is followed by a discretionary presidential act in *Dalton v. Specter*.[61] The Court also held that where a decision is committed to the President's discretion, nonstatutory is unavailable as well.

The case involved another complex multi-step statutory process that vested decision-making in an agency, a separate independent commission, the President, and finally Congress.[62] The Defense Base Closure and Realignment Act of 1990 aimed to create a politically feasible method for closing military bases.[63] The statute required the Secretary of Defense to prepare recommendations for base closure and realignment, pursuant to criteria promulgated through notice and comment rulemaking.[64] The Secretary then submitted those recommendations to Congress and to the independent Defense Base Closure and Realignment Commission, whose eight members were appointed by the President.[65] The Commission then submitted a report with its own recommendations for closure and realignment to the President.[66] At that point, the President could decide whether to approve or disapprove the Commission's recommendations in their entirety.[67] It was an all-or-nothing proposition. If the President disapproved the Commission's recommendations, the process would repeat itself, and if the President disapproved a second time, then no bases would be closed.[68] If however the President approved the Commission's recommendations, the President would submit the recommendations and his certification of approval to Congress, which would have 45 days to enact a joint resolution

[61] 511 U.S. 462 (1994).
[62] *Id.* at 464-66.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*

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of disapproval.[69] If such a resolution did not pass, only then could the Secretary close the bases.[70]

In 1991, this process produced a decision to close the Philadelphia Naval Shipyard.[71] Plaintiffs, including Pennsylvania Senator Arlen Specter, sued to enjoin the closure of the base, arguing that the Secretary and the Commission violated the APA and the 1990 Act.[72] The Supreme Court reversed the Third Circuit and held that neither the agencies' nor the President's actions were subject to judicial review under the APA.[73] This reaffirmed the holding of Franklin. Actions by the Secretary and the Commission were unreviewable under the APA because they were not final agency action.[74] Their recommendations carried no legal consequences for the affected parties until the President decided whether to approve.[75] The President's action was final but still unreviewable under the APA because the APA does not apply to the President.[76] The Court devoted a mere one sentence to this latter conclusion, citing to *Franklin* without expanding on that case's rationale for excluding the President from the APA's coverage.

The court in *Dalton* also went a step further in holding that nonstatutory review of presidential action is not available for decisions committed to the President's discretion. The Court first noted that the statutory claims in the case did not fall within *Franklin*'s holding that presidential actions are reviewable for constitutionality outside the APA.[77] The Court then assumed "for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA," but held that "such review is not available when the statute in question commits the decision to the discretion of the President."[78] Here, although the statute gave the President no power to amend the list of bases to be closed, it gave him completely unfettered discretion in the decision whether to accept or reject the recommendations.[79] Therefore, judicial review was not appropriate.[80] Significantly, that same result might have been reached had the APA applied to the President, given that Section

[69] *Id.*

[70] *Id.*

[71] *Id.* at 466. That is, the Secretary recommended the closure, the Commission also recommended the closure, the President approved the closure, and Congress rejected a joint resolution of disapproval of the closure.

[72] *Id.*

[73] *Id.* at 468-69.

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.* at 471-74.

[78] *Id.* at 474.

[79] *Id.* at 476.

[80] *Id.*

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701(a)(2) precludes judicial review of decisions "committed to agency discretion by law."[81] Ultimately, the Court rejected the plaintiffs' claims that failure to provide judicial review would repudiate *Marbury v. Madison*'s imperative that every right deserves a remedy.[82] "The judicial power of the United States conferred by Article III of the Constitution is upheld just as surely by withholding judicial relief where Congress has permissibly foreclosed it, as it is by granting such relief where authorized by the Constitution or by statute."[83]

In subsequent decisions on finality, the Supreme Court has both clarified and seemingly loosened the finality requirements applied in *Franklin*. The Supreme Court created the currently prevailing two-pronged test for finality in *Bennett v. Spear*[84]: agency action is final when it (1) marks the consummation of the agency's decision-making process, rather than being tentative and (2) is an action that determines rights and obligations or from which legal consequences will flow.[85] That test could lead to the same conclusion in *Franklin*, on the theory that the consequences did not flow until the President made his report to Congress. But in applying the *Bennett* test, the Court has found action to be "final" within the meaning of the APA without requiring that it be the last in the chain of administrative actions. In *Bennett* itself, the Court deemed final a Biological Opinion from the Fish and Wildlife Service even though it later went to an action agency.[86] Likewise, in the more recent case *U.S. Army Corps of Engineers v. Hawkes*, the Court held that a Jurisdictional Determination from the Army Corps on whether land constitutes "waters of the United States" is final agency action even though the determination just means the owner needs a permit from EPA to develop

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[81] 5 U.S.C. § 702(a)(2). Below, I will explain various ways in which nonstatutory and APA judicial review are not so well aligned. It is noteworthy that the President's APA exemption so frequently arises in the context of deciding whether an agency's action is final, because it illustrates just how often the President works together with agencies. If the President usually worked alone, his APA exemption would stand on its own. But because the President is usually working with an agency, and because plaintiffs are in the habit of suing every possible defendant, the President's APA exemption often functions as a limitation on review of agency action deemed not final, in addition to a limitation on review of the President's own actions. That is, the President's APA exemption is often invoked in the context of an argument from the government that an agency's action wasn't final because of the President's involvement.

[82] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)

[83] *Dalton*, 511 U.S. at 477.

[84] 520 U.S. 154 (1997).

[85] *Id.* at 177-178.

[86] *Id.* at 178. In this section of the its opinion, the *Bennett* Court distinguished *Franklin* and *Dalton* on the grounds that the agency reports in those cases were "purely advisory and in no way affected the legal rights of the relevant actors." *Id.*

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the land.[87] That would have been true even without the JD, which just clarifies the owner's status.[88] The Court held that the denial of a safe harbor was enough to constitute legal consequences.[89] Even if those holdings cast some doubt on the finality analysis in *Franklin* (and it's unclear whether they do), that would at most remove one context in which the President's APA exemption is relevant. But of course, it won't always be the case that an agency acts first followed by the President, which happened to be the order of operations presented in both *Franklin* and *Dalton*. As discussed in the next Section, the President's APA exemption is also relevant when the President orders an agency to use its statutory discretion in a certain way or when the President redelegates his own statutory authority to an agency, among other examples.

B. The Nonbinary World

This Section discussed the difficulty of applying Franklin's binary rule to a nonbinary world in which teamwork between agencies and the President is pervasive. Even at the time *Franklin* was decided, the diverse statutory schemes under which the President and agencies share authority made the binary rule simple in theory but difficult in practice. One example is what Kevin Stack has identified as "mixed delegations," instances in which Congress explicitly delegates authority to the President and agencies together. Another is subdelegations, in which Congress first delegates authority to the President, often ostensibly anticipating that he won't keep that authority for himself, and the President then redelegates that power to an agency. And executive teamwork is trending upward. The growing body of scholarship on what Justice Kagan coined "presidential administration" has documented that instances of presidential-agency teamwork are increasingly common. Collaboration has become the rule, not the exception, especially if one includes OIRA's cost-benefit analysis of agency rules and major guidance documents within the definition of "executive teamwork." Finally, another prominent body of scholarship is relevant to the President's APA exception: the Unitary Executive Theory. Under that theory, the President possesses the power to control the entire Executive Branch and can direct policymaking by all executive agencies, within Congressionally set limits. If that's true, the already blurry line in the sand between agency action and Presidential action may be blown away entirely. Remember, we are not concerned here with what nonstatutory review of Presidential action should entail, a topic addressed by several of the scholars cited in this section.

[87] 136 S. Ct. 1807, 1813-14 (2016).
[88] *Id.* at 1814-15.
[89] *Id.*

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Rather, our focus is the predicate question of whether to apply the APA or nonstatutory review when the President acts with an agency. Section I.C.i covers mixed delegations and subdelegations; it also touches on the ambiguous meaning of delegations to the President in name. Section I.C.ii deals with presidential administration and the unitary executive in theory; Section I.C.iii addresses them in practice.

1. Mixed Delegations and Subdelegations

In numerous statutory schemes, Congress has explicitly delegated authority to the President and one or more agencies together. Many of these laws were passed after the APA and before *Franklin*, such that it does not seem unreasonable to infer that Congress may have assumed that the APA would govern at least the agency's actions under the statutes. But in identifying and discussing these mixed delegations, no scholar has suggested whether the APA ought to apply to actions taken pursuant to mixed delegations, a significant gap in the literature.

In the context of arguing against the Presidential administration theories discussed in the next Section, Kevin Stack's scholarship has identified what he calls "mixed agency-President delegations."[90] These are statutes that "condition the grant of authority to either the President or the agency on the approval, direction, control, findings, or involvement of the other."[91] Stack breaks these mixed delegations into two categories. The first he calls "conditional delegations," which authorize agents to act subject to the President's control.[92] These are statutes that empower agencies to act

[90] Stack, *President's Statutory Powers*, *supra* note XX, at 268. Stack argues, contra both presidential administration and unitary executive theories, that because Congress knows how to give the President power over agency action when it so desires, the President can take over an agency's statutory authority or direct agencies to exercise their statutory authority in a certain way only when Congress expressly delegates such power to the President. Put differently, delegations only to agencies do not impliedly give the President "directive authority" over the agencies' exercise of their statutory power. Going a step further, Stack contends that like an agency, the President should receive *Chevron* deference only for those statutes that she "administers," meaning those statutes that explicitly grant power to her. This conclusion stands against Kagan's argument that presidential direction of agency action should be a prerequisite for *Chevron* deference. If a statute does not explicitly grant directive power to the President, Stack argues that his executive orders cannot legally bind lower officials. Rather, the agency owes the President only a form of *Skidmore* deference in considering his policy preferences. *But see* Nina A. Mendelson, *Another Word on the President's Statutory Authority Over Agency Action*, 79 Fordham L. Rev. 2455 (2011) (arguing that Stack is wrong to read explicit delegations to the President as implied proof that Congress did not intend to grant directive authority to the President in statutes delegating authority to only an agency).

[91] *Id.* at 276.

[92] *Id.* at 278-81.

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"with the approval of," "with the approbation of," or "under the direction of" the President.[93] Stack marshals examples from the earliest days of the republic through modern times. A 1789 statute directed the Secretary of War to "conduct the business of the said department in such manner, as the President of the United States shall from time to time order and instruct." [94] Today, to borrow a few more examples from Stack, the Secretary of Agriculture has rulemaking authority over agricultural production "with the approval of the President"[95]; the Secretary of the Interior can use federal resources to construct water conservation projects "in such manner as the President may direct"[96]; and the Secretary of Transportation may suspend the permits of foreign air carriers, without a hearing, but "subject to the approval of the President."[97]

The second category of mixed delegations is what Stack calls "agency-specified delegations" to the President.[98] These are statutes that grant power to the President but direct him to act through or on the recommendation of a specific agent.[99] Current statutes authorize the President "through the Secretary of Labor" to develop policies for addressing unemployment[100] and instruct that the President "should direct the Secretary of State" with respect to international research on climate change.[101] In a 2002 statute on border security and visas, Congress *defined* the term "President" as "the President of the United States, acting through the Assistant to the President for Homeland Security, in coordination with the Secretary of State, the Commissioner of Immigration and Naturalization, the Attorney General" and several other officials.[102] If that's the *definition* of President, good luck applying *Franklin*.

Subdelegations can present similar challenges. A

[93] *Id.*

[94] Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (codified as amended at 5 U.S.C. § 301 (2018)). In 1798, another statute directed the Secretary of War to "provide, at the public expense, under the direction of the President of the United States, all necessary books, instruments and apparatus, for the use and benefit of said regiment." Act of Apr. 27, 1798, ch. 33, § 3, 1 Stat. 552, 553 (repealed 1802).

[95] 7 U.S.C. § 610(c) (2018).

[96] 16 U.S.C. § 590z (2018).

[97] 49 U.S.C. § 41304(b) (2018).

[98] Stack, *President's Statutory Powers*, *supra* note XX, at 282-283.

[99] *Id.*

[100] 15 U.S.C. § 3116(a) (2018).

[101] 15 U.S.C. § 2952(a) (2018).

[102] Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, § 2(6), 116 Stat. 543, 544 (codified at 8 U.S.C. § 1701(6)). In his signing statement, President Bush objected to this language on Constitutional grounds, but only because he thought the Take Care Clause and the "unitary executive" should give him greater power to direct agencies than the statute allowed.

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subdelegation occurs when Congress delegates statutory power to the President, who in turn redelegates that power to an agency.[103] Scholars have argued that when Congress delegates power to the President in name, it is often, or even usually, with the possibility of subdelegation in mind.[104] Congress knows that the President can't execute many administrative programs on his own, but it wants him to play a coordinating role by redelegating the authority to the most effective actors within the administrative state.[105] On this view, a delegation directly to an agency is not a limitation on the President's power to control that agency's action, but rather a limitation on the President's authority to choose which agency has authority to implement the statute.[106]

This argument is consistent with a federal law, the Presidential Subdelegation Act, which explicitly authorizes the President to redelegate his statutory powers.[107] It finds additional support in historical practice. In the early days of American bureaucracy, Congress delegated almost all administrative power to the President in name. At that point in history, it was well understood that the President would not wield most of that power himself, but would instead do so through agents. (Arguably the holding in *Franklin* is inconsistent with this history.) But over the course of the 20th century, Congress came to delegate more and more authority directly to agencies, reducing the power of the President to oversee agency action. The trend toward presidential administration, discussed in the next Section, could be seen as an effort by the President to take back that power over the structure of his own branch of government.

In such cases, the President might play no role at all in the agency's subsequent action. Should Congress's original decision to delegate power to the President be enough, given the President's unique constitutional position, to insulate any action taken pursuant to that statute from the APA even when the President plays no part? Courts have faced exactly that question in a series of cases applying *Franklin* to permits for cross-border development projects issued by agencies, pursuant to power redelegated to them by the President.

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[103] As just one example, the President has redelegated his statutory authority to approve international bridges, which I discuss at length in Section II.C.

[104] Kagan, *supra* note XX, at 2329.

[105] *Id.*

[106] *Id.*

[107] 3 U.S.C. § 301 (2018) (authorizing the President to designate any Senate-confirmed executive branch official to perform statutory functions vested in the President); *see also* Mendelson, *supra* note 90, at 2464 ("The Presidential Subdelegation Act communicates Congress's understanding that, notwithstanding its use of the word 'President' in authorizing statutes, agencies could properly implement the statutes with no presidential involvement whatsoever. Instead, it is simply the President's choice how much to supervise, direct, or approve.").

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Section II.C looks at these cases in greater detail, but the bottom line is that like mixed delegations, subdelegations present difficult problems for applying *Franklin*.

2. Presidential Administration and the Unitary Executive

Academic theories about Presidential Administration and the Unitary Executive argue for an enhanced role for the President in directing agency action, the former as a matter of policy prudence and the latter as a matter of constitutional mandate. The binary rule seems at least somewhat inconsistent with these notions. And as the structure and function of the executive branch evolves to embody those theories, the binary rule becomes more difficult to administer and more problematic for fans of executive accountability.

Most readers are likely familiar with then-Professor Kagan's pathbreaking article, so I will provide only a brief sketch of the more relevant points. Descriptively, through a case study of the Clinton Administration, she argued that Presidents have increasingly made the administrative state an extension of their own political and policy agendas.[108] They have accomplished this through greater directive authority over agencies and by taking ownership of regulatory activity.[109] (Obama's DAPA speech discussed in the Introduction might be one example of the latter.) Kagan argues that this greater Presidential control over agency action is lawful because explicit delegations to agencies are also implicit delegations to the President.[110] Unlike the unitary executive theorists discussed in the next Section, Kagan argues that Congress has the power to delegate authority to an agency actor alone, to the exclusion of the President, but she interprets simple delegations to agency actors as not including such a limitation.[111] The structure and norms of the executive branch also give the President significant influence over executive agencies, most explicitly through his power of appointment and removal, but in more practical ways as well, such as in his role coordinating efforts between agencies. Therefore, "when Congress delegates to an executive official, it in some necessary and obvious sense also delegates to the President."[112] Normatively, Kagan argues that the President's increased control is good, enhancing both accountability and effectiveness.[113] Possible tradeoffs between politics and expertise should not be overstated, she argues,

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[108] Kagan, *supra* note XX, at 2272-2319.
[109] *Id.* at 2284-99.
[110] *Id.* at 2319-31.
[111] *Id.* Kagan reads "a standard delegation [to an executive agency] as including the President, unless Congress indicates otherwise." *Id.* at 2327.
[112] *Id.* at 2327
[113] *Id.* at 2331-2346.

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because so much of administrative decision-making involves value judgments, rather than pure scientific expertise, and bureaucrats lack the political mandate to impose their value judgments without the President's oversight.[114] Kagan does not say how far the President's control over an agency can extend, such as whether the President could publish a rule in the Federal Register against the wishes of the agency head responsible for implementing it.[115]

In order to facilitate presidential administration, Kagan argues for tweaks to judicial review doctrines.[116] Traditionally, courts reviewing agency actions have been somewhat skeptical of political influence, especially when political motivations lead an agency to change a preexisting policy.[117] On the contrary, Kagan argues that the President's legitimating political influence should be embraced. She would condition *Chevron* deference on "the political leadership and accountability that the President offers."[118] Only those interpretations over which the President exercised actual control would receive deference.[119] Similarly, she would relax substantive "hard-look" review of agency actions where "demonstrable evidence shows that the President has taken an active role in, and by so doing has accepted responsibility for, the administrative decision in question."[120] In short, an agency acting with presidential direction would receive more deference in its interpretations and weaker judicial oversight of its decisions.

Granting such legal significance to the President's directive control over agencies complicates the President's APA exemption. Once the President's "political leadership and accountability"[121] is required to legitimate agency action, it becomes more difficult to distinguish agency action from presidential action. And even if the line were still clear, it would be more difficult to justify drawing one. If separation of powers concerns militate against judicial review of the President passing along an agency's report to Congress, as in *Franklin*, one might think they would be equally or even more forceful when the President makes important value judgments to

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[114] *Id.* at 2353.

[115] Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127, 1133 n.20 (2010).

[116] Kagan, *supra* note XX, at 2372-83.

[117] *See* FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1810 (2009); Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983); Tummino v. Torti, 603 F. Supp. 2d 519, 547 (E.D.N.Y 2009). And beyond skepticism, courts will invalidate agency action when political pressure leads to an agency decision based on reasons or factors that are irrelevant under the authorizing statute. D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1236 (D.C. Cir. 1971).

[118] Kagan, *supra* note XX, at 2376.

[119] *Id.* at 2376-77.

[120] *Id.* at 2380.

[121] *Id.*

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shape an agency's regulatory agenda or decide a contentious question of policy.

The Unitary Executive Theory[122] is closely related to Kagan's arguments, and its relevance to my arguments is similar. In its strongest form, unitary executive theory poses perhaps even bigger problems for the *Franklin* binary than does presidential administration, but these problems remain more theoretical. Simply put, Unitary Executive Theory relies on the fact that Article II, Section 1 of the Constitution vests the executive power of the United States in the President alone.[123] He therefore must have complete control over his agents. And, in part because of the President's constitutional power to remove the heads of agencies, any power given to the executive branch is the President's to wield.[124] As leading unitary executive theorists Stephen Calabresi and Saikrishna B. Prakash put it, the President "constitutional right to take action in the place of an inferior officer to whom a statute purports to give discretionary executive power."[125] If the executive branch is truly unitary, if the executive branch *is* the President, then a doctrine applying the APA to agencies but not the President is nonsense. It creates a distinction where none can possibly exist. Of course, this strong version of the unitary executive theory is inconsistent with much more of current administrative law doctrine than just *Franklin*. It would also suggest, for instance, that independent agencies are unconstitutional. But even if unitary executive theory remains, to a large extent, just a theory, its implications for the President's APA exemption are worth considering.[126]

The merits of the dispute between Kagan and Stack are beyond the scope of this paper. Ultimately, they both make persuasive arguments, and the dispute boils down to a disagreement about the default rule for statutory interpretation. Setting aside the constitutional arguments of unitary executive theorists, Kagan and Stack would likely agree that Congress has the power to

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[122] *See generally* Calabresi & Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 595 (1994); Martin S. Flaherty, The Most Dangerous Branch, 105 YALE L.J. 1725 (I996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM L. REV. 1 (1994); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41. *But see* Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702-03 (2007).

[123] U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

[124] Calabresi & Prakash, *supra* note XX, at 599 ("[T]he President must be able to control subordinate executive officers through the mechanisms of removal, nullification, and execution of the discretion 'assigned' to them himself.").

[125] *See id.* at 595.

[126] Another possibly relevant argument, from Jack Goldsmith and John Manning, suggests that the President has a "completion power" to go beyond (although not against) statutory mandates. *See* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2297 (2006).

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either limit the President's directive authority over agency action, for instance by creating an independent agency, or to give the President directive authority, for instance by conditioning the agency's authority on Presidential approval. The question is whether how to read the vast majority of statutes that are silent on directive authority. Kagan argues that the normative desirability of presidential oversight of executive agencies militates in favor of interpreting simple delegations to agencies and including the President. And Stack argues the opposite. What matters for my paper is the scholars' descriptive observations: between mixed delegations and presidential administration, the President's role in the administrative state is growing. And whether that's good or bad, it complicates the *Franklin* analysis. The next Section takes a closer look at presidential administration in practice.

3. Explosion of Presidential Administration in Practice

It bears repeating that the tension between executive teamwork and the President's APA exemption is not just theoretical. As explored in Part II, lower courts have already taken on this challenge in several cases, reaching inconsistent results. And the frequency with which the issue presents itself is increasing rapidly. As Kagan documents, starting with President Reagan and expanding in particular under President Clinton, Presidents have been exerting increased directive control over agency actions.[127] And the extent of presidential administration has exploded even further since Kagan's article was published. President Obama issued numerous executive orders, directives, and memoranda that told agencies how to exercise their authority, including on such matters as student debt,[128] retirement savings,[129] and overtime pay.[130] Building on this practice by his predecessors, President Trump has used executive orders more aggressively than any President in history to direct agency action, especially in the field of immigration.[131] His

[127] Kagan, supra note XX, at 2272-2319.

[128] Memorandum for the Secretary of the Treasury and the Secretary of Labor, *Helping Struggling Federal Student Loan Borrowers Manage Their Debt*, June 9, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/06/09/presidential-memorandum-federal-student-loan-repayments

[129] Memorandum for the Secretary of the Treasury, *Retirement Savings Security*, Jan. 28, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/01/28/presidential-memorandum-retirement-savings-security.

[130] Memorandum for the Secretary of Labor, *Updating and Modernizing Overtime Regulations*, March 13, 2014, http://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations (directing the Secretary of Labor "to propose revisions to modernize and streamline the existing overtime regulations").

[131] *See, e.g.*, the so-called "travel ban" orders: Executive Order 13769, *Protecting the Nation from Foreign Terrorist Entry into the United States* (Jan. 27, 2017); Executive Order

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orders have directed agencies on policies regarding refugee admissions and travel from certain countries,[132] sanctuary cities,[133] and military service by transgender individuals,[134] among others. The resulting wave of lawsuits challenging those executive orders and the agency actions implementing them brings the issue to the fore. To put it another way, Presidents since Reagan have engaged in a concerted effort to blur the line between Presidential and agency action. *Franklin* traced its rule along a line that no longer exists. It is a binary rule in a nonbinary world.

C. *Why It Matters: Differences Between APA and Nonstatutory Review*

This Section looks at the significant differences between APA and nonstatutory review. If the nonstatutory review that applies to the President and the APA review that applies to agencies were largely interchangeable, the choice between those regimes when the President and agencies work together would be largely semantic. The problems posed by implementing *Franklin*'s binary rule in the nonbinary world would be of little practical significance. But nonstatutory review and APA review are not close substitutes. Other scholars, Stack chief among them, have written extensively about what nonstatutory review of Presidential action *should* look like. But what does it entail under current doctrine? A forthcoming article by Lisa Marshall Manheim and Kathryn A. Watts addresses this question in detail.[135] (Their article aims to start a conversation about what form nonstatutory review should take in lawsuits challenging Presidential action, but again without much consideration of the predicate question of how to distinguish presidential action from agency action.) In short, they found "existing judicial precedents [do not] provide anything close to a well-developed or coherent legal framework for courts to follow when reviewing presidential orders."[136] They therefore call for "a cohesive framework to guide judicial review of presidential

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13780, *Protecting the Nation from Foreign Terrorist Entry into the United States* (Mar. 6, 2017); Presidential Proclamation 9645 (Sept. 24, 2017).

[132] *Id.*

[133] Executive Order 13768, Enhancing Public Safety in the Interior of the United States (Jan. 25, 2017).

[134] Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security, *Military Service by Transgender Individuals* (Aug. 25, 2017).

[135] Lisa Marshall Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. Chi. L. Rev. (forthcoming 2019). As the authors explain in their abstract, nonstatutory review has become particularly important because "Donald Trump's entrance into the White House . . . prompted an explosion of lawsuits that took direct and immediate aim at presidential orders involving everything from sanctuary cities to transgender troops." Manuscript at 1. Many of those lawsuits, including the travel ban litigation, also name various agency actors as defendants.

[136] *Id.* at 6.

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orders," which "would best be formed through deliberative discussion among scholars, judges, litigants, and members of Congress."[137]

The Supreme Court has never used nonstatutory review to issue an injunction against the President. Thus, most scholarly analysis of nonstatutory review of presidential action rests on rather speculative foundations.[138] One thing that can be said with confidence: *Franklin* itself held that even when the APA does not apply, judicial review is available to decide whether presidential action complies with the constitution.[139] But the extent of nonstatutory review for violations of statutory law remains unclear. The plaintiffs in *Dalton* tried to smuggle statutory claims into Franklin's carveout for constitutional claims by arguing that the President violates the constitutional separation of powers whenever he exceeds his statutory authority, but the Court rejected that argument, distinguishing between true constitutional claims and those asserting an official has exceeded statutory authority.[140] The Court in *Dalton* assumed without deciding "that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA."[141] But because the court found that the decision in question was committed to the President's discretion, it left for another day a decision on the scope of nonstatutory review of statutory claims. In the absence of clear Supreme Court precedent, the lower courts have struggled to set the bounds of nonstatutory review. The leading case from the D.C. Circuit is *Chamber of Commerce v. Reich*.[142] In that case, the plaintiffs sued the President arguing that an executive order governing government contracting violated the National Labor Relations Act.[143] The court held that even absent a statutory cause of action, like the one provided by the APA, nonstatutory review was available for claims that the executive acted in excess of statutory authority.[144] Congress intends for the executive to follow its laws, and a court failing to enforce the law would leave parties subject to arbitrary power.[145] The Court therefore enjoined the executive order.[146] Other lower courts, however, have rejected the holding in *Reich* and instead decided that nonstatutory review is not available for claims

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[137] *Id.* at 7.

[138] *See generally* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997).

[139] Franklin v. Massachusetts, 505 U.S. 788, 801 (1992). The Court, however, dismissed the challengers' constitutional claims on the merits. *See also* Webster v. Doe, 486 U.S. 592, 603-605 (1988).

[140] Dalton v. Specter, 511 U.S. 462, 472 (1994).

[141] *Id.* at 474.

[142] 74 F.3d 1322 (D.C. Cir. 1996).

[143] *Id.* at 1324.

[144] *Id.* at 1327-29.

[145] *Id.*

[146] *Id.* at 1339.

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that the President has exceeded statutory authority.[147]

Based on *Franklin*, *Dalton*, and *Reich*, it seems likely that nonstatutory review requires at least adherence to the constitution and clear statutory mandates. But certain aspects of the APA are either definitely not included, like procedural requirements (think notice and comment), or probably not included, like rationality review (testing whether an action is arbitrary and capricious). Perhaps more significantly, even if nonstatutory review includes some of the same substantive features as APA review, nonstatutory review is less reliable. In part, this is because of a difference in the amount of available precedent. Cases imposing nonstatutory review on executive actions have appeared with greater frequency in the Trump era, but remain sparse. Plaintiffs seeking to challenge an agency's action under the APA have much more information about what doctrines will apply. That makes APA litigation far more consistent and certain.[148] Further, suits seeking nonstatutory review are more likely to run into prudential roadblocks than suits that proceed under the APA, with its provision of a cause of action and waiver of sovereign immunity. For these reasons, a decrease in the availability of the APA for challenging agency action in which the President is involved will lead to weaker judicial review, even when nonstatutory review is available.

1. Lack of Clarity

The scope of APA review is relatively clear. Every day, courts across the country issue opinions interpreting the APA and the administrative law doctrines that have grown up around it. Litigants bringing suits under the APA know what to expect in a variety of areas: exhaustion requirements, preclusion doctrine, interpretive deference regimes, hard-look substantive review. The scope of nonstatutory review is far less clear. The Sections that follow explain the possible scope of nonstatutory review based on the information available, but the case law is sparse and inconsistent. This is not a surprise. After the APA provided a cause of action and waiver of sovereign immunity (as discussed in the next Section) for litigants to challenge agency action, they didn't have much use for nonstatutory review. That meant that during the regulatory revolution of the 20th century, when the field of administrative law went from an afterthought to the main event, no new precedent on nonstatutory review was being developed. Only the combination of *Franklin*'s exempting the President from the APA with the

[147] *See, e.g.*, Bernstein v. Department of State, 974 F. Supp. 1288 (N.D. Cal. 1997).

[148] An analogy here can be drawn to businesses' choice of where to incorporate. Even if Delaware's corporation code is not that much more business-friendly than another state's, a majority of companies still choose to incorporate in that state because its larger body of business precedent reduces the costs of legal uncertainty in business decisions.

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rise of presidential administration brought nonstatutory review back into the frame. Even then, both litigants and courts are drawn to relying on traditional administrative law doctrine, that is, APA doctrine, because it is what they know. For that reason, plaintiffs seeking to challenge a presidential order will usually also name implementing agents in their suits, so they can bring APA claims. And even when courts find that the APA doesn't apply, they often give content to nonstatutory review by analogizing to APA-based review doctrines. As a result, fairly little doctrine has developed for what nonstatutory review of presidential actions should entail. Manheim and Watts have persuasively argued that a "more theorized legal framework" is required to reduce the "uncertainty" and "inconsistency" of nonstatutory review of presidential actions.[149]

2. Cause of Action and Sovereign Immunity

The APA in Section 702 both provides a cause of action to those aggrieved by agency action and, thanks to an amendment in 1976, also waives sovereign immunity from such claims.[150] This removes what could be substantial hurdles for plaintiffs suing the government.

Lower courts have interpreted the APA's waiver of sovereign immunity as applying to claims against agencies even when a plaintiff's cause of action is not premised on the APA.[151] The Supreme Court has not yet answered that question. Kathryn Kovacs has persuasively argued that the courts of appeals have gotten this wrong, and the sovereign immunity waiver should be subject to the other limitations in the APA, such as the requirement for final agency action.[152] Were the Supreme Court to adopt Kovacs's view, the availability of the APA's sovereign immunity waiver would turn on the same finality analysis that produced *Franklin*.

At least in theory, nonstatutory review should provide its own equitable cause of action[153] and because the defendant in a nonstatutory-

[149] Manheim & Watts, *supra* note XX, at 52-53.

[150] 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.")

[151] *See, e.g.*, Chamber of Commerce v. Reich, 74 F.3d 1322, 1328-29 (D.C. Cir. 1996).

[152] Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155 (2016).

[153] Nonstatutory review has a long pedigree. It is how William Marbury sued James Madison and how Youngstown Sheet & Tube Co. sued Charles Sawyer. *See generally*, Siegel, *supra* note XX.

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review suit is the officer rather than the government itself, sovereign immunity should not apply, regardless of the scope of the APA's waiver of sovereign immunity.[154] As the D.C. Circuit explained in *Chamber of Commerce v. Reich*, the most significant case allowing nonstatutory review against the President, "if the federal officer, against whom injunctive relief is sought, allegedly acted in excess of his legal authority, sovereign immunity does not bar a suit."[155] This is because the sovereign has empowered the officer to act only within his lawful scope, so actions taken outside legal authority are deemed the acts of the officer, not the sovereign. "There is no sovereign immunity to waive—it never attached in the first place."[156]

But that doctrine relies on a legal fiction that has vexed judges for all the nation's history. Writing shortly after *Franklin* and arguing that the President should still be amenable to suit, Jonathan Siegel argued that courts should employ an updated version of nonstatutory review to provide remedies to those aggrieved by Presidents' unlawful statutory actions.[157] Siegel traced the history of nonstatutory review. According to his account, nonstatutory review sprung from the remedial imperative: every right deserves a remedy.[158] When the doctrine of sovereign immunity threatened to prevent individuals aggrieved by government action from vindicating their rights, courts devised nonstatutory review as a workaround. Plaintiffs could sue executive officers in their personal capacities, and the court would entertain the legal fiction that the defendant was an individual, rather than the government, in order to circumvent immunity.[159] Initially, nonstatutory review could be used only when an executive officer committed an affirmative unlawful act, because the legal fiction was strongest when the actor had stepped outside his lawful governmental duties.[160] But later, nonstatutory review expanded to also cover actors who were simply following orders or who made an unlawful omission.[161] As nonstatutory review expanded even further, it not only blocked the defense of sovereign immunity but also provided a cause of action.[162]

Siegel argued that nonstatutory review ran into problems, however, when judges did not keep in mind the falsity of the legal fiction.[163]

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[154] *See* United States v. Lee, 106 U.S. 196 (1882); *see also* Ex Parte Young, 209 U.S. 123 (1908).
[155] *Reich*, 74 F.3d at 1329.
[156] *Id.*
[157] *See* Siegel, *supra* note XX, at 1670-78.
[158] *Id.* at 1627-28.
[159] Id. at 1632-34.
[160] *Id.* at 1637-39.
[161] *Id.* at 1639-44.
[162] *Id.*
[163] *Id.* at 1644-47.

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Sometimes, judges woke up from the dream.[164] When that happened, they would promptly dismiss the case on sovereign immunity grounds because the true defendant was the government and the individual defendant had just been carrying out government business. Other times, courts told the lie so well that they started to believe it.[165] When courts took the legal fiction too seriously, they forgot that this was really a suit against the government. Then a court might dismiss the case because the individual defendant had resigned or turned out not to be the person most responsible for the harm. Had the court remembered that the real point here was to sue the government, it would have been more willing to simply sub in a different defendant. Because of these issues, Siegel describes the historical version of nonstatutory review as a regime that "can easily lead to error."[166] His proposed version would not suffer from these faults, but he offers no reason to believe that today's judges are any better at handling legal fictions. If anything, modern textualist courts may be more resistant to them.

Even if courts do not fall prey to these errors in resurrecting nonstatutory review, Siegel's article is largely theoretical. As he acknowledges, the Supreme Court has never used nonstatutory review to issue an injunction against the President. And Siegel likewise acknowledges that courts' general anxiety about interfering with the President's constitutional powers even when reviewing statutory action might make judges hesitant to give nonstatutory review much teeth. As noted above, it seems likely but not certain that judicial review extends at least to whether Presidential action has statutory authority, but in many cases even that limited review might be cut off by concerns about immunity or presidential discretion.

When suits are against an agency that worked together with the President, those prudential concerns about deference to the President may be reduced to some extent. But given its somewhat unreliable history, it seems likely that nonstatutory review will continue to be less reliable than APA review in providing a cause of action and waiver of sovereign immunity.

3. Rationality Review

The APA directs reviewing courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[167] In implementing this provision, the

[164] *Id.* at 1647-50 (citing, *inter alia*, Weeks v. Goltra, 7 F.2d at 845 (8th Cir. 1925) *aff'd*, 271 U.S. 536 (1926)).
[165] *Id.* at 1650-57.
[166] *Id.* at 1707.
[167] 5 U.S.C. § 706.

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D.C. Circuit created and the Supreme Court ratified what is known as "hard-look review."[168] Courts look at the administrative record to ensure that the agency's policy decisions were rational and supported by sufficient evidence.

Nonstatutory review likely does not extend that far. Although it is always difficult to prove a negative, no court has ever used nonstatutory review to question the rationality of an executive order. Scholars have made various proposals. Stack has argued that courts should give more searching substantive review of Presidential actions in at least one circumstance.[169] When statutes require the President to make certain findings before he is empowered to act, Stack argues that courts should inquire into whether the required conditions precedent were actually met.[170] Even if adopted, this intervention is fairly narrow and comes far short of hard-look review. David Driesen has gone further to argue that courts should apply something akin to arbitrary-and-capricious review to ensure that presidential orders are supported by facts, as well as by a rationale adequately connected to the claimed source of legal authority.[171] Kathryn Kovacs has gone as far as to argue that *Franklin* was wrongly decided and the APA's arbitrary and capricious standard should apply to the President.[172] Manheim and Watts take a middle ground position, arguing that the President should be required to give a non-arbitrary justification for his actions in the text of his orders, but that he should not be required to produce the long preamble and administrative record that accompanies an agency rulemaking.[173] These proposals are all intriguing, but none appear on the verge of implementation. As it stands, courts applying nonstatutory review to executive orders, as the Supreme Court did in *Trump v. Hawaii*, generally limit their review of executive orders to whether they comply with statutes and the Constitution.

4. Procedural Review

This issue is simple. The APA imposes various procedural requirements on agencies. The most well-known is that "informal" legislative rules must

[168] Motor Vehicles Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983); Automotive Parts & Accessories Assn. v. Boyd, 407 F.2d 330 (D.C. Cir. 1968).

[169] Stack, *Reviewability*, supra note XX.

[170] *Id.* at 1199.

[171] David M. Driesen, *Executive Orders' Rationality* (SSRN Working Paper, 2018)

[172] Kathryn E. Kovacs, Trump v. Hawaii*: A Run of the Mill Administrative Law Case*, 36 Yale J. on Reg.: Notice & Comment (May 3, 2018), http://yalejreg.com/nc/trump-v-hawaii-a-run-of-the-mill-administrative-law-case-by-kathryn-e-kovacs/ (arguing that the Supreme Court was wrong in *Franklin* and that presidential orders should be subject to APA review).

[173] Manheim & Watts, *supra* note XX, at 76.

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go through a notice and comment procedure, with specific requirements for how an agency must notify the public of its plans and how it must take feedback on those plans.[174] Judges have created additional doctrines to set parameters for these processes, like the logical outgrowth test for rules. By contrast, there are no procedural requirements at all for presidential actions. They don't take any particular form: there are numbered executive orders, proclamations, memos to agency heads, and so forth. Litigants have had some success suing Trump's agencies for their sloppy procedural missteps, but no such procedural suit can be brought against the President under nonstatutory review.

Stack argues that the lack of procedural requirements for the President is one reason not to read implied authority for the President into statutory delegations to other executive officials. Stack argues that allowing the President to take on statutory authority would "short-circuit the administrative process that Congress typically specifies for agency actors."[175] And while the President might lend political legitimacy to the administrative state, process has also been "a persistent source of legitimacy for administrative action."[176] But under unitary executive theory, when the President assumes the power to execute a law in the place of the express delegee, he can exercise that authority without following the procedural requirements that would otherwise apply to the delegee. In this way, Stack argues, "statutory constructions that imply directive powers disrupt Congress's interest in specifying the procedures through which statutory delegations should be implemented."[177] And there's nothing that nonstatutory review would do about it.

5. Deference to Statutory Interpretation

Under *Chevron*, agencies receive deference for their reasonable interpretations of the statutes they administer.[178] Although courts are highly deferential to the President, they have not established any particular deference regime for evaluating his statutory interpretation. Stack has argued that the President should be granted *Chevron* deference in his interpretations of statutes, but only for statutes that explicitly grant him authority.[179] When

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[174] 5 U.S.C. § 553

[175] Stack, *President's Statutory Powers*, 106 COLUM L. REV. 263, 318 (2006).

[176] *Id.*

[177] *Id.*

[178] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

[179] Stack, *President's Statutory Powers*, *supra* note XX, at 299-312.

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the President tells agencies how to interpret statutes that delegate authority directly to the agency, Stack argues the President should receive only *Skidmore* deference, even from the agency.[180] Given courts' deferential treatment of the President, Stack's argument seems unlikely to be implemented. It thus remains unclear hwat form of deference courts will grant to statutory interpretations within nonstatutory review.

6. Remedies

The scope of remedies available under the APA is well-established. In general, declaratory and injunctive relief are available against agencies; monetary damages are not. By contrast, courts wary of separation of powers concerns are extremely hesitant to issue an injunction against the President. Some, including Justice Scalia in his *Franklin* concurrence, have questioned whether the courts can enjoin the President at all.

However, this particular aspect of nonstatutory review might not pose a huge impediment to the efficacy of judicial review of executive teamwork. Because the President almost never personally executes his orders, injunctive relief against his subordinates will often afford full relief in suits challenging joint presidential-agency actions.

The foregoing demonstrates that APA and nonstatutory review differ in significant ways. Scholars have offered proposals for what nonstatutory review should entail, but in practice it remains largely amorphous. Thus, the choice between review regimes is significant.

II. The Messy Business of Applying the APA to Executive Teamwork

This paper is the first of which I am aware to conduct a comprehensive survey of the caselaw interpreting *Franklin*. My research reveals that lower courts have found it difficult to apply the President's APA exemption to facts that differ from those in *Franklin* and *Dalton*. A couple of situations present easy cases. First, it is clear that when a plaintiff attempts to sue the President directly, including the Trump-era trend of pre-enforcement suits directly against Executive Orders, the APA does not apply. Second, pursuant to *Franklin* and *Dalton*, when the President works together with an agency, and the President is responsible for the last, nondiscretionary act, lower courts follow *Franklin* to hold that the APA does not apply. But in practice, that seems to be the rarer case by far. It is much more common that the President acts first, issuing an order or directive, and then leaves the agency to iron out the details. And in those situations, the lower courts are split. Some courts

[180] *Id.* at 314.

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have cabined *Franklin* to the context of finality, such that the APA applies so long as the President doesn't act last. Plaintiffs can just wait for an agency to implement the President's directives, sue the agency, and obtain APA review. Other courts have looked to the nature of the action. If it's "presidential," then the APA doesn't apply, even if an agency does most or even all of the work. This Part details those dueling approaches, then explores their virtues and vices through a case study of international permits for bridges and oil pipelines. For its part, the Supreme Court has dodged the question in several cases, leaving the lower courts to duke it out.

A. The "Last Act" Approach

The first approach to implementing the President's APA exemption is to limit it to circumstances in which the President himself takes the final action. If the decision-making process ended with the President exercising discretion, then the APA does not apply. But in pretty much any other circumstance, agency actions otherwise final can be reviewed under the APA regardless of participation by the President. When the President orders an agency to do something, the agency's action implementing that command will be subject to the APA. Even when the President acts after an agency, if the President's action is only ministerial, the agency's might be deemed final for purposes of the APA.

The most-cited source for the proposition that *Franklin* should be limited to situations in which the President acts last is dicta in the D.C. Circuit's opinion in *Chamber of Commerce v. Reich*.[181] In that case, the plaintiffs challenged an executive order from President Clinton directing the Secretary of Labor to issue certain regulations.[182] The plaintiffs challenged the President's executive order directly without suing the agency. As such, an APA claim challenging the implementing regulations was not part of the case, and the Court was left with nonstatutory review of the President's action, as discussed above.[183] But in dicta, the Court speculated that if the plaintiffs had brought an APA claim against the agency, review would have been available.[184] The government had argued, and other courts would later adopt the view, that "a cause of action under the APA is not available, even were appellants to rely on it, because a challenge to the regulation should be regarded as nothing more than a challenge to the legality of the President's Executive Order and therefore not reviewable."[185] But the D.C. Circuit threw

[181] 74 F.3d 1322, 1327 (D.C. Cir. 1996).
[182] *Id.* at 1324-25.
[183] *Id.* at 1326-27.
[184] *Id.*
[185] *Id.*

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cold water on this argument, writing, "that the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question."[186] For this proposition, the Court cited an earlier D.C. Circuit opinion, *Public Citizen v. United States Trade Representative*.[187] That case had explained the limiting principle of this more formalist approach: "*Franklin* is limited to those cases in which the President has final constitutional or statutory responsibility for the *final step* necessary for the agency action directly to affect the parties."[188]

In a subsequent case involving rulemaking, a district court applied this last act approach to permit review of regulations issued pursuant to an executive order (but precluding review of the President's order itself). *Bernstein v. Department of State*[189] involved an order by President Clinton directing the Department of Commerce to issue regulations on the export of nonmilitary encryption products. The plaintiff challenged both the President's order and the regulations that the agency promulgated implementing the order.[190] The Court first held, disagreeing with *Chamber of Commerce v. Reich*, that nonstatutory review was not available to consider whether the President's order was inconsistent with the substantive statute in question.[191] However, turning to the agency regulations, the Court held that they could be reviewed under the APA.[192] The Court saw the question as one of finality: "Of critical importance in both *Franklin* and *Dalton* was the fact that the President was responsible for the final action under the statutes at issue."[193] Here, the President left it to the agency to devise the final rules. "Accordingly, this court will examine whether the Commerce Department's regulation of encryption items is consistent with the" substantive statute.[194]

That same year, the Ninth Circuit observed in *City of Carmel–By–The–Sea v. Department of Transportation*[195] that "under certain circumstances, Executive Orders, with specific statutory foundation, are treated as agency action and reviewed under the Administrative Procedure

[186] *Id.*

[187] Public Citizen v. United States Trade Representative, 5 F.3d 549, 552 (D.C. Cir. 1993).

[188] *Id.* (emphasis added).

[189] 974 F. Supp. 1288 (N.D. Cal. 1997).

[190] *Id.* at 1291-92.

[191] *Id.* at 1300 (holding that "[i]n light of the recent Supreme Court decisions in this area, this court concludes that it cannot review whether the President exceeded his statutory authority"). This holding confirms what I argue above: nonstatutory review is less reliable than judicial review under the APA.

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] 123 F.3d 1142 (9th Cir. 1997).

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Act."[196] That is, where the President through an executive order delegates statutory power to an agency, and in the order directs the implementing agencies to make certain findings or take certain actions, the agency's subsequent decisions are subject to review under the APA. This review of the agency action covers both compliance with the requirements of the Executive Order (giving the court "law to apply" for the purposes of preclusion doctrine) and whether the agency action is arbitrary and capricious, neither of which would likely be included in nonstatutory review.[197]

Even when the president acts last, courts taking the finality approach might find the agency's prior action to be final when the President's subsequent action is ministerial[198] or when some aspect of the agency's action is not subject to presidential review. The cases are not clear or consistent on how much discretion the President must exercise to trigger the APA exception. In *Franklin*, the President acted as a middle man, taking in data, running a few rote calculations, and then passing along the results. But the Court there found that his action was discretionary, not ministerial. That appears to set a low bar for discretion.

In *Public Citizen*, as noted above, the D.C. Circuit took the last act approach to *Franklin*. It held that the Office of the Trade Representative's completed negotiation of the North American Free Trade Agreement was not final agency action, because the agreement did not carry legal consequences until the President submitted it to Congress.[199] "The President is not obligated to submit any agreement to Congress, and until he does there is no final action."[200] The discretionary act of submitting a treaty to Congress, which the President is under no obligation to do, seems safely more discretionary than the task of submitting the apportionment at issue in *Franklin*, where the statute said "shall."

But in *Corus Group v. International Trade Commission*,[201] the Federal Circuit held that an agency action was final even when it was followed by a subsequent action from the President. Under the Trade Act of 1974, when the International Trade Commission finds that increased imports of a product are causing "serious injury" to the domestic industry, the President is directed to take "all appropriate and feasible action" to help the domestic industry and can impose duties on imports.[202] The President can

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[196] *Id.* at 1166.
[197] *Id.*
[198] Here, lower courts are picking up on the dicta in *Franklin* distinguishing discretionary and ministerial presidential acts.
[199] Public Citizen v. United States Trade Representative, 5 F.3d 549, 551-52 (D.C. Cir. 1993).
[200] *Id.*
[201] 352 F.3d 1351 (Fed. Cir. 2003).
[202] *Id.* at 1353-55.

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also impose the duties if the commission is evenly divided in its injury finding.[203] Once the Commission makes the requisite finding, the President has wide latitude in deciding what relief to provide.[204] In this case, the Commission was evenly divided, and the President imposed a duty on certain tin mill products.[205] The plaintiffs sued alleging that the Commission was not actually evenly divided but rather had made a negative determination as to injury, in which case the President would have been acting beyond his statutory powers.[206] The Federal Circuit affirmed the judgment below for the defendants, but did so only after finding that the Commission's vote could be reviewed under the APA. The Court wrote that, because "the President's action was lawful only if the Commission was evenly divided," the President's "action was not discretionary, and the validity of the proclamation is dependent on whether three commissioners in fact found serious injury with respect to tin mill products."[207] Perhaps by straining the meaning of the word "discretionary," the Court found that *Bennett*, rather than *Franklin* or *Dalton*, governed the case, and that the agency action here passed the *Bennett* test for finality.[208]

The problem with the last act approach[209] is that it's hard to square with the absolute language in *Franklin*. That case included a finality analysis, but its announcement of the President's APA exemption was not cabined to that context. The Court interpreted the statute to not apply to the President ever. The last act approach puts too much emphasis on the formalistic mechanics of *Franklin* and not its spirit. The case held that separation of powers concerns militated against applying the APA to the President. It would seem absurd for that holding to turn simply on the order of operations. And because the President so rarely acts on his own, his exemption from the APA becomes next to a nullity if any related, final agency action can give rise to APA review.

B. The "Presidential Nature" Approach

The second group of cases extends *Franklin* beyond the context of deciding whether an agency's action is final to emphasize the separation of powers concerns that led the Court to exempt the President from the APA. If

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[203] *Id.* at 1355-56.
[204] *Id.*
[205] *Id.* at 1356.
[206] *Id.*
[207] *Id.* at 1359.
[208] *Id.* at 1360.
[209] Several other cases taking the last act approach are discussed infra, Section II.D, as part of my discussion on the Supreme Court's failure to offer further guidance on applying *Franklin*.

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the President's discretionary choices are to be exempted from judicial review, then plaintiffs shouldn't be able to circumvent that exemption just because some other official takes a subsequent action to implement the President's decisions. What's more, when Congress delegates statutory power to the President, these courts interpret that delegation as intended to limit judicial review. So even if the President subdelegates the power entirely to an agency, the APA still doesn't apply. The problem with this approach, discussed more fully below, is that it seems to present a rather slippery slope. What is to stop the President from cutting off APA review by issuing orders telling agency personnel how to do their jobs?

In *Tulare County v. Bush*,[210] the plaintiffs challenged the President's proclamation establishing the Giant Sequoia National Monument pursuant to the Antiquities Act.[211] To circumvent the President's exemption from the APA, the plaintiffs included claims that the "Forest Service's current implementation of the Proclamation" violated the National Forest Management Act and the National Environmental Policy Act, and was therefore unlawful under the APA.[212] The Court made quick work of dismissing these claims, because the "Forest Service [was] merely carrying out directives of the President, and the APA does not apply to presidential action."[213] The Court argued that a narrower reading of *Franklin* would lead to absurd results: "[a]ny argument suggesting that this action is agency action would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action."[214] On appeal, the D.C. Circuit dodged the issue. The Court affirmed the dismissal without addressing this issue because "the complaint does not identify these foresters' acts with sufficient specificity to state a claim."[215]

In the context of rulemaking, a recent district court opinion reached the same conclusion, with a deeper discussion of the *Franklin* conundrum. In *Ancient Coin Collectors Guild v. U.S. Customs and Border Protection*,[216] the court considered import restrictions on Chinese and Cypriot coins issued by Customs and Border Protection and the Department of State, acting pursuant to a subdelegation of statutory authority from the President. The court framed the question in this way: "does an agency cease to be an 'agency' for APA purposes when it acts pursuant to delegated presidential authority, rather than

[210] Tulare Cty v. Bush, 185 F. Supp. 2d 18 (D.D.C. 2001).
[211] *Id.* at 21.
[212] *Id.*
[213] *Id.* at 28.
[214] *Id.* at 28-29.
[215] 306 F.3d 1138, 1143 (D.C. Cir. 2002).
[216] 801 F. Supp. 2d 383 (D. Md. 2011).

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pursuant to authority conferred directly to the agency by statute?"[217] After noting that neither the Supreme Court nor any Court of Appeals had answered the question directly, the court concluded that "the State Department and Assistant Secretary were acting on behalf of the President, and therefore their actions are not reviewable under the APA."[218] The court based this holding on the separation of powers: "Although agencies, such as the State Department here, occupy a different 'constitutional position' than does the President, when those agencies act on behalf of the President, the separation of powers concerns ordinarily apply with full force—especially in an area as sensitive and complex as foreign affairs."[219] And it also found that declining to review the agency action was consistent with Congress's decision to delegate the power to the President in the first place: "by lodging primary responsibility for imposing cultural property import restrictions with the President, rather than with an agency, Congress likely recognized these separation-of-powers concerns."[220]

Likewise, a Ninth Circuit case that predates *Franklin* held that where the President delegated authority to approve regulations, the agency's action was not reviewable under the APA. *Jensen v. National Marine Fisheries Service*[221] concerned regulations to protect halibut promulgated pursuant to a treaty between the U.S. and Canada. A commission issued the regulations, which then had to be approved by the President and the Governor General of Canada.[222] The President delegated his role in the process to the Secretary of State by executive order.[223] Relying on the deference owed to the President in foreign relations, the court concluded, "Since presidential action in the field of foreign affairs is committed to presidential discretion by law . . . it follows that the APA does not apply to the action of the Secretary in approving the regulation here challenged."[224]

The problem with this approach is that it insulates standard agency processes, like rulemaking and adjudication, from APA review simply because the President played some role. It presents the prospect that the President could indemnify every agency action by issuing an executive order telling the agency how to use its discretion. Or under the Unitary Executive Theory, the President could assume the agencies' authority and take actions in their name, again insulating the resulting acts from the APA. In writing *Franklin* in 1991, Justice O'Connor likely couldn't anticipate the extent to

[217] *Id.* at 402.
[218] *Id.* at 403.
[219] *Id.* at 403-404.
[220] *Id.* at 404.
[221] 512 F.2d 1189, 1191 (9th Cir. 1975).
[222] *Id.*
[223] *Id.*
[224] *Id.*

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which the President would become entwined with agency action. It seems unlikely she intended to let the President protect agency actions from searching judicial review with the swish of a pen.

The next Section takes a deeper dive into how one particular set of issues, the subdelegation of the President's authority to issue permits for cross-border bridges and oil pipelines, has divided the courts, highlighting the virtues and vices of the dueling approaches.

C. The Divide in Action: "Presidential" Permits Issued by Agencies

Because *Franklin* questions arise in so many difference contexts, it can be difficult to determine whether the two approaches outlined above are actually inconsistent or whether the courts are just reaching different conclusions based on different facts. But in a series of decisions concerning permits for international bridges, oil pipelines, and power lines, district courts reached opposite conclusions on nearly identical facts. And did so while making it clear that they thought the judges on the other side of the debate were not just wrong but egregiously so.

The cases arise under similarly structured permitting regimes for bridges, oil pipelines, and power lines. In each, the President has delegated the authority to issue permits to the Department of State, working in concert with other agencies.[225] The permit application is referred to the President only when a conflict arises between agencies on whether to grant it. The majority rule emerging from district courts in cases challenging permits is that APA review is unavailable because the permitting decisions are presidential in nature, even if an agency takes the only action. Courts in reaching this conclusion look to separation of powers concerns and to the intent of Congress in delegating to the President in the first instance.

The most extensive discussion is provided by *Detroit International Bridge Company v. Government of Canada*.[226] The case involved the apparently cumbersome task of approving international bridges, which multiple constitutional actors have found to be beneath them. For roughly the first two centuries of the nation's history, Congress was in charge of the approval process.[227] But growing frustrated with the need to pass legislation every time someone wanted to build a bridge from Michigan to Canada,

[225] One potentially significant difference between the permitting regimes in question is that for bridges, the President's authority derives (at least in part) from statute, whereas his power over oil pipeline permitting is from the Constitution. Perhaps not surprisingly, on average, courts seem to view actions taken pursuant to delegated Constitutional authority as more inherently "presidential" than actions taken with authority from redelegated statutory authority.

[226] 189 F. Supp. 3d 85 (D.D.C. 2016).

[227] *Id.* at 93-96.

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Congress delegated the task to the President in the International Bridge Act of 1972.[228] That statute requires presidential approval for the building of all international bridges.[229] The President then redelegated that authority to the Secretary of State, requiring that she consult with the "Secretary of the Treasury, the Secretary of Defense, the Attorney General, and the Secretary of Transportation."[230] So long as those departments all agree that the permit is in the national interest, the Secretary of State issues the permit without consulting the President.[231] In the instant case, the agencies agreed that the permit should be issued and therefore the President was not involved.

In deciding whether the APA applied to a challenge to the permit, the Court acknowledged that the President had redelegated his authority to the agency and that only statutory, as opposed to constitutional, power was at issue.[232] However, the Court still held that the APA did not apply.[233] This was because, under *Franklin* and *Dalton*, "the determinative consideration is whether the action involved a discretionary (as opposed to a ministerial or ceremonial) exercise of authority committed to the President by the Constitution or by Congress."[234] The Court, repeating the phrase "determinative consideration," also wrote, "the determinative consideration is not whether the actions were actually taken by the President personally . . . but whether separation of powers concerns articulated in *Franklin* and *Dalton* apply."[235] That is, where the actions taken are "presidential in nature," there is no APA review, regardless of whether the President acted last or at all.[236] In addition to those Supreme Court precedents, the Court based its decision in part on practical considerations: "It would be impracticable to expect the President to make these decisions personally because that is simply not how government works."[237] In this way, the Court was recognizing that the formalist test, taken to its logical conclusion, could produce absurd results. And the court found in the very subdelegation of authority an act of discretion by the President sufficient to cut off review: "When the President retains final authority pursuant to the Constitution or a valid statute, such as here, presidential acquiescence constitutes an exercise of discretion that gives effect to the delegee's actions."[238]

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[228] *Id.*
[229] 3 U.S.C. § 535 et seq.
[230] E.O. 11423 § 1(b)-(c)
[231] *Id.* § 1(d)-(f)
[232] *Detroit International Bridge Company*, 189 F. Supp. 3d at 97.
[233] *Id.* at 105.
[234] *Id.* at 99.
[235] *Id.* at 103
[236] *Id.* at 101.
[237] *Id.* at 104.
[238] *Id.*

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The Court acknowledged that the President's supervision of executive agencies could render much administrative action "presidential" in nature, but the Court cited Elena Kagan's *Presidential Administration* for the limiting principle that the President's involvement should cut off review only when the agency is exercising Presidential authority, rather than when the President exercises agency authority in his supervisory role.[239] This distinction seems a bit slippery, especially given the prevalence of mixed delegations. Indeed, in this very statute, Congress instructed the President to seek the input of the agencies, delegating them at least some of the power in the first instance, before the President gave it all up.

Applying these principles to the instant case, the Court had no trouble deciding that the APA did not apply, because Congress made the conscious choice to vest discretion in the President.[240] No matter who actually took the action, the President's power was being exercised.

Several other cases reach the same result in the related context of international oil pipelines. In *Natural Resources Defense Council v. U.S. Department of State*,[241] the District Court denied a challenge to the permit for the Keystone Pipeline in part because the permit, issued by the State Department, represented presidential action outside the scope of the APA. The court wrote that, "because the State Department is acting for the President in issuing presidential permits . . . it too cannot be subject to judicial review under the APA."[242] The plaintiffs erred, the court concluded, by "conflating the question of whether a particular action is final with the question of whether a particular action is presidential."[243] Here, the action was presidential, so it didn't matter who acted last. The meaning of *Franklin*, the court reasoned, is to distinguish "reviewable agency action from unreviewable presidential action by the nature of the President's authority over agency decisions, not by whether or how the President exercised that authority."[244] The court based its decision on separation of powers concerns, especially in the context of foreign relations. Bottom line: "Where, as here, the President (as opposed to Congress) delegates his inherent constitutional authority to a subordinate agency and that authority is not limited or otherwise governed by statute, the agency's exercise of that discretionary authority on behalf of the President is tantamount to presidential action and cannot be reviewed for abuse of discretion under the APA."[245] And in this

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[239] *Id.*
[240] *Id.* at 105.
[241] 658 F. Supp. 2d 105, 109 (D.D.C.2009).
[242] *Id.*
[243] *Id.*
[244] *Id.* at 110.
[245] *Id.* at 113.

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case, the decision of whether to apply the APA or nonstatutory review was significant. Because the plaintiffs' substantive argument was that the agency had violated the National Environmental Policy Act, which does not itself create a cause of action, preclusion of APA review decided the case. Without the APA, the plaintiffs had no cause of action.[246] As such, nonstatutory review was not a viable alternative.

Likewise, in *Sisseton–Wahpeton Oyate v. U.S. Department of State*,[247] the District Court rebuffed a similar challenge to the Keystone Pipeline because the presidential permits were exempt from APA review. The plaintiffs argued that because the action in question was taken by an agency, it was not presidential, but the court disagreed. "The President is free to delegate some of his powers to the heads of executive departments, as he has done here, and those delegation actions that are carried out create a presumption of being as those of the President."[248] Finally, in a later case, *White Earth Nation v. Kerry*,[249] the court rejected a challenge to the State Department's interpretation of a pipeline permit, observing that "the overwhelming authority supports a finding that the State Department's actions in this case are Presidential in nature, and thus not subject to judicial review."[250] Again, it is worth noting that the court's decision not to apply the APA ended the case, and it did not consider nonstatutory review.[251]

But despite that reference to "overwhelming authority," another court in the same district reached the opposite result. In *Sierra Club v. Clinton*,[252] the District Court permitted APA review of a presidential permit because the agency's action in issuing the permit was final, regardless of whether the action was presidential in nature. The opinion did not cite *Franklin* or give any extended discussion of the reviewability issue. In a somewhat conclusory footnote, the court distinguished *NRDC* and *Sisseton–Wahpeton Oyate*, writing, "the Court respectfully disagrees with those decisions insofar as they hold that any action taken by the State Department pursuant to an executive order, and in particular the preparation of an EIS for a major federal action, is not subject to judicial review under the APA."[253]

Another recent case also declined to follow the presidential nature approach in a permitting case, this time concerning international electric transmission lines. The court in *Protect Our Communities Foundation v.*

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[246] *Id.*
[247] 659 F. Supp. 2d 1071, 1082 (D.S.D. 2009).
[248] *Id.*
[249] No. CV 14–4726 (MJD/LIB), 2015 WL 8483278, at *6-7 (D. Minn. Dec. 9, 2015).
[250] *Id.*
[251] *Id.*
[252] 689 F. Supp.2d 1147 (D. Minn. 2010)
[253] *Id.* at 1157 n.3.

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Chu[254] noted that the line of cases discussed above has been "called into question."[255] It then held, without much discussion, that while none of the other district court precedents is binding, it would follow *Sierra Club* and allow review, "especially in light of the fact that an agency could theoretically shield itself from judicial review under the APA for any action by arguing that it was 'Presidential,' no matter how far removed from the decision the President actually was."[256]

As noted, a trend in these cases is that the opinions often suggest the contrary position is not just wrong but absurd. They might all be right.

D. SCOTUS Dodges the Question

On several occasions, lower courts have applied the formalist last act test to limit *Franklin* in cases that eventually went to the Supreme Court, but for various reasons, the Justices have decided the cases on other grounds each time.

One example is *House of Representatives v. Department of Commerce*.[257] In that case, a three-judge District Court panel distinguished *Franklin*, even though the exact same statutory framework was involved, holding that the Census Bureau's plan to use statistical sampling as part of the 2000 census did constitute final agency action. The Court distinguished the cases because the challenge to the sampling method "affects the manner in which the decennial census will be conducted in order to generate the number—and the only number—that the President will receive from the Secretary."[258] The reasoning was beyond confusing, but the idea seemed to be that while the President might have the discretion to tell the Secretary to count overseas military personnel differently, he would not have the discretion to tell the Secretary to redo the entire census. Therefore, the 2000 Census Report was final agency action for the purposes of this case.[259]

The Supreme Court affirmed but on different grounds.[260] As part of the political fight over the Census Bureau's plan to use statistical sampling, Congress passed and the President signed legislation partially overriding *Franklin* just in this context. The statute provided a cause of action to sue in federal court over "the use of any statistical method" in the census and specifically stated that the Bureau's census plan "shall be deemed to

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[254] No. 12-CV-3062, 2014 WL 1289444 (S. D. Cal. Mar. 27, 2014)
[255] *Id.*
[256] *Id.*
[257] 11 F. Supp. 2d 76 (D.D.C. 1998), *aff'd*, 525 U.S. 316 (1999).
[258] *Id.* at 93.
[259] *Id.*
[260] 525 U.S. 316, 328-29 (1999).

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constitute *final agency action* regarding the use of statistical methods in the 2000 decennial census."[261] And the Supreme Court held that this legislation "eliminated any prudential concerns . . . ."[262]

Similarly, in *Judicial Watch v. National Energy Policy Development Group*, the District Court opinion included a lengthy discussion denying the government's motion to dismiss APA claims against agency heads, even though the Vice President was also one of the named defendants.[263] The district court declined to address whether the Vice President shares the President's exemption from the APA.[264] As for the APA claims against agencies, the Court denied the motion to dismiss and held that agency heads' decisions to hold subcommittee meetings without complying with FACA constituted final agency action.[265] Somewhat bizarrely, the Court did not cite *Franklin* in this part of its opinion. Rather, it addressed *Franklin* in a part of the opinion addressing whether the agency heads' decisions constituted "agency action" at all, rather than whether that action was final. Relevant to this paper, the Court wrote that for purposes of the APA, "there is no statutory basis for distinguishing between actions taken by an agency head as an advisor to the President and actions taken as the administrator of the agency."[266] And prudential reasons counseled against a broad reading of *Franklin*: "Given the vast number of agency actions that include an element of advice-giving, to hold that a decision made by the head of an agency while serving in an advisory role to the President is not subject to the APA would render a large number of agency actions unreviewable."[267] The Court thus recognized that absurd results can follow from reading *Franklin* too broadly, holding "that an action that otherwise would qualify for the APA's definition of 'agency action' does not fall outside the coverage of the APA simply because the agency head acts in an advisory capacity to the President."[268] The Court then went into an entirely separate finality discussion, holding that the agency heads' actions were final under the test from *Bennett v. Spear*, because the decision to hold closed meetings was consummated and because it created a legal consequence in the form of decreased transparency.[269] Again, the Court did not cite *Franklin*. But by the time the case made it to the Supreme Court in *Cheney v. U.S. District Court for the District of Columbia*, only the claims directly against the Vice President were still at issue, and the

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[261] *Id.* at 327, 329 (emphasis added).
[262] *Id.*
[263] 219 F. Supp. 2d 20 (D.D.C. 2002)
[264] *Id.* at 35.
[265] *Id.* at 39-40.
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.* (citing Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).

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case was reversed on unrelated grounds.[270]

Finally, in the Fourth Circuit's decision enjoining President Trump's travel ban, it addressed the applicability of the APA in response to claims from the government that the plaintiffs lacked a cause of action.[271] A plurality of the circuit court acknowledged that the APA does not apply to the President, but held that the plaintiffs could still invoke the APA against the various agencies tasked with implementing the travel ban.[272] For this proposition, the Court cited the dicta from *Chamber of Commerce v. Reich*, which was clearly on point, and Justice Scalia's concurrence from *Franklin*, which might have been only partially relevant. As discussed above, in his concurrence, Justice Scalia wrote that even where direct review of the President's actions is precluded, "[r]eview of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive."[273] The relevance of this citation is at least somewhat doubtful because it is likely that Justice Scalia was talking about the availability of nonstatutory review against the President's subordinates in such a situation, rather than about the applicability of the APA. Regardless, when the Supreme Court decided the statutory claims in the travel ban case, it dodged this issue: "we may assume without deciding that plaintiffs' statutory claims are reviewable, notwithstanding consular nonreviewability or any other statutory nonreviewability issue, and we proceed on that basis."[274]

In sum, despite a few opportunities to do so, the Supreme Court has not expounded on the contours and limits of its one paragraph in *Franklin* exempting the President from the APA. This puts increasing pressure on the lower courts to parse the meaning of *Franklin*, especially as the number of lawsuits challenging joint presidential-agency actions surges during the Trump era. As this Part has shown, the courts have not seemed up to the task. Both sides accuse the other of absurdity, and I would suggest that they are both right. The formalist last act camp's approach has the virtue of limiting the violence that *Franklin* can do to the traditional means of reviewing agency action. But its focus on finality is difficult to justify. *Franklin* exempted the President from the APA across the board. It made this pronouncement in the context of a finality analysis only because that was the issue in the particular

[270] 542 U.S. 367 (2004) (mentioning the APA only in passing). On remand from the Supreme Court, the D.C. Circuit explained in a footnote that the APA claims were no longer part of the case because the agency defendants had all complied with the trial court's discovery orders. In re Cheney, 406 F.3d 723, 724 n. 1 (D.C. Cir. 2005).

[271] International Refugee Assistance Project v. Trump, 883 F.3d 233 (4th Cir. 2018) (en banc).

[272] *Id.* at 284.

[273] 505 U.S. 788, 824 (Scalia, J., concurring in part and concurring in the judgment).

[274] Trump v. Hawaii, 138 S. Ct. 2392, 2407 (2018).

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case. The presidential nature camp's approach might seem more faithful to the President's blanket exemption, but at what cost? It is equally absurd to insulate agency actions from judicial review simply because the President told the agency what to do. Both approaches apply a blunt instrument to surgery that requires the careful use of a scalpel. In the next part, I propose a more nuanced approach that respects the President's unique position in our government without sacrificing the value of holding the Executive accountable to the rule of law.

III. A SENSIBLE LINE BETWEEN APA AND NONSTATUTORY REVIEW

A. Others' Ideas

As noted above, no scholar has previously dedicated any extended treatment to the predicate question of how to draw the line between agency and President for the purposes of applying *Franklin*. But several of the scholars cited previously in this paper have addressed the issue in passing. Because the issue was often an afterthought, these comments on *Franklin* are vague and at times contradictory, even within otherwise excellent scholarly works. They therefore provide no clear way forward.

Kagan discusses the possible objection, suggested by scholars like Peter Strauss,[275] that presidential administration will lead to lawlessness, because courts will not stop illegal presidential actions.[276] But she spends just one paragraph on her answer and does not come to a clear conclusion. She writes that, since *Marbury*, "the Court has posited a sphere of 'superstrong' presidential discretion over political matters, not amenable to judicial control; but never has the Court indicated, nor could it consistent with rule of law principles, that all exercises of presidential authority fall within this zone."[277] How a court should think about the contours of this zone, she does not say. In a footnote, Kagan briefly mentions the possibility of nonstatutory review. "Even assuming APA review were unavailable in such cases, courts potentially could review outside the APA framework certain presidential action alleged to exceed statutory authority."[278] She writes that although *Dalton v. Specter* precluded review of presidential action, that case pertained to a statute granting the President open-ended discretion. "Outside, no less than inside, the APA framework, the question of congressional intent with respect to reviewability looks very different when the delegation is a bounded

[275] Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997).
[276] Kagan, *supra* note XX, at 2350-51.
[277] *Id.*
[278] *Id.* at 2351 n. 402.

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one to an agency official."[279]

Implicit in this discussion of nonstatutory review is a remarkable implication: Kagan seems to be acknowledging (if not full-on conceding) that the President's direction of agency decision-making could cut off APA review of those decisions, leaving litigants hoping to challenge agency action with nonstatutory review. As discussed above, this is not an inconsequential substitution of judicial review regimes. In practice, nonstatutory review is far more limited, even than the more deferential review that Kagan proposes for presidentially directed agency actions. This presents a possible tension in Kagan's article: Her proposals for altering *Chevron* and hard look review to provide greater deference to the President are tied to APA review, but the APA might not apply at all to these presidentially directed decisions.

Stack sharply disagrees with Kagan and argues that the President should be treated like an agency when exercising statutory powers and should therefore be subject to searching judicial review for statutory compliance, receive *Chevron* deference, and so forth.[280] But he failed to address in any depth how a litigant can hale the President into court in the first place. He also says little about how a plaintiff should decide whether to sue the President or the executive officers through whom he acts. Stack acknowledges that the APA does not apply to the President and that there is no judicial review of decisions committed to the President's discretion.[281] "But just because review for abuse of discretion is not available does not mean that there is no review. Rather, courts still may review a president's assertion of statutory power to determine whether it is authorized by statute."[282] Stack writes that although there is much scholarly interest in suing the President in her own name, an easier path to judicial review is to sue whatever executive officer is tasked with implementing the order.[283] Stack writes that in such a suit, "the cause of action may be based either on the APA or on so-called nonstatutory review."[284] Stack does not elaborate on this point. It seems somewhat unlikely that all it would take for a plaintiff to sweep the President's decisions back into the arms of the APA is to sue some officer who helps implement her order. Rather, such a suit would prototypically seek nonstatutory review. By lumping those two causes of action together, Stack seems to gloss over the possibility, as previously discussed, that those options are not equivalent with respect to the type and strength of review that they offer.

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[279] *Id.*
[280] *See generally* Stack, *Statutory President*, supra note XX.
[281] *Id.* at 555.
[282] *Id.*
[283] *Id.*
[284] *Id.* at 556.

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Stack returned to these issues, again somewhat opaquely, in his article arguing that the President should receive deference only when interpreting statutes that delegate power to him by name.[285] Because Stack was primarily concerned with what mixed delegations say by negative implication about whether the President has power to direct agencies when a delegation is to the agency alone, he did not focus on how a mixed delegation might affect the choice of judicial review regime. Like Kagan, he addressed the topic in a single footnote.[286] In arguing that Congress has reason to be intentional in its choice of delegee, Stack observed that, because of *Franklin*, "Congress's choice of delegate determines whether the Administrative Procedure Act applies."[287] Thus, if Congress wants to preclude APA review, it can delegate power explicitly to the President. But at the same time, Stack suggested, seemingly in agreement with Kagan, that *Franklin* "should not bar judicial review under the APA when the President directs an agency action under a statute that grants power to the agency."[288] The scope of this statement is not entirely clear, but it would seem to apply only to statutes that give full authority to an agency. Specifically with respect to judicial review of actions taken pursuant to mixed delegations, then, Stack provides no guidance. The correct application of *Franklin* in this situation is far from obvious.

For their part, Manheim and Watts fairly read *Franklin* as foreclosing APA review of executive orders, which gives them an opening to argue for what review regime should apply to such presidential directives.[289] They also shrewdly recognize the possibility that executive teamwork might complicate matters: "A plaintiff seeking to contest the lawfulness of a presidential order nevertheless might activate some of the APA's provisions by bringing an indirect challenge."[290] They could do so by suing an agent of the President, preferably a subordinate who has done something to implement the allegedly unlawful executive order that would constitute final agency action. About this possibility the authors say that, "[f]or these lawsuits, some of the APA's provisions may well apply," including the cause of action and waiver of sovereign immunity.[291] For this proposition, they cite to a recent Ninth Circuit case allowing for review of an executive order to the extent it was incorporated in an agency rule.[292]

Jason Marisam addressed the impact of subdelegations on judicial

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[285] Stack, *President's Statutory Powers*, *supra* note XX.
[286] *Id.* at 290 n.121
[287] *Id.*
[288] *Id.*
[289] Manheim & Watts, *supra* note XX, at 38, 72.
[290] *Id.* at 38.
[291] *Id.*
[292] *See* East Bay Sanctuary Covenant v. Trump, 2018 WL 6428204, at *15 (9th Cir. Dec. 7, 2018).

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review in the context of a broader discussion of the costs and benefits of Congress delegating authority to the President directly instead of agencies.[293] Marisam argues that delegating statutory power to the President presents significant tradeoffs.[294] Delegations to the President enhance democratic accountability and exploit the President's comparative advantage at efficiently and coherently apportioning tasks among lower executive officials.[295] At the same time, delegations to the President enable arbitrary decision-making because of the President's APA exemption.[296] But Marisam observes in passing, without citation and in conflict with much of the caselaw discussed in this paper, that "the APA would apply if the President subdelegated authority to an agency."[297]

B. "Agency Nature": Applying the APA to Presidentially Influenced Agency Action

It is into this morass that I wade with what I hope is a relatively simple proposal. In this Section, I will first explain why my argument is not that *Franklin* should simply be overturned. I then describe, taking *Franklin* as a given, how I suggest courts differentiate between agency and presidential action. In the following Sections, I defend that proposal on both doctrinal and political grounds.

Some scholars, Kathryn Kovacs chief among them, have argued that *Franklin* should be overturned, so that the APA would apply to the President.[298] Of course, that would solve most of the problems with administering *Franklin* identified in the this paper. The task of distinguishing between presidential and agency action would become irrelevant were the APA to apply in either case. But this paper does not argue for overturning *Franklin* and instead takes the rule that the APA does not apply to the President as a constant. In part, this is because, although the *Franklin* opinion was unreasoned, there may be some arguments in support of the holding. For instance, because is difficult to distinguish between the President's constitutional and statutory powers, especially in the area of foreign affairs,[299]

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[293] Jason Marisam, *Duplicative Delegations*, 63 Admin. L. Rev. 181, 232-36 (2011)
[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.* at 234.
[298] Kathryn E. Kovacs, Trump v. Hawaii*: A Run of the Mill Administrative Law Case*, 36 Yale J. on Reg.: Notice & Comment (May 3, 2018), http://yalejreg.com/nc/trump-v-hawaii-a-run-of-the-mill-administrative-law-case-by-kathryn-e-kovacs/ (arguing that the Supreme Court was wrong in *Franklin* and that presidential orders should be subject to APA review).
[299] In Justice Jackson's famous concurrence in the Steel Seizure case, he actually defined

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applying the APA to the President's statutory powers might have the unintended consequence of infringing his constitutional powers. And that might be a separation of powers problem. But primarily, I do not call for *Franklin* to be overturned for practical reasons. The conservative Roberts Court has shown great respect for presidential power and has demonstrated no interest in revisiting *Franklin*. My argument will thus have greater real-world import if it focuses on the pressing problem of when *Franklin* should apply, rather than on the attractive but improbable case for why *Franklin* should be overturned. With *Franklin* thus taken as a given, I turn to my proposal.[300]

First, the last act camp's approach must be dismissed, even though it is the more attractive of the two existing doctrinal alternatives. Its primary virtue is that it errs on the side of APA review, which gives more remedies to more rights than nonstatutory review. But it does so through a hollow formalism that is not true to the intention of *Franklin*. I am no great fan of *Franklin*'s holding, but distinguishing it into oblivion is not faithful to precedent. That case exempted the President from the APA in all cases. It was not meant to turn on the order of operations, with APA review when the President acts first and nonstatutory review when he acts last. Because the President spends most of his time telling other people what to do, he almost

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the scope of the President's constitutional powers based on the scope of his statutory powers. His famous tripartite framework holds that the President's constitutional power is at its apex when he also has Congressional approval to act in an area, and at its nadir when Congress has forbidden his action. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-639 (1952) (Jackson, J., concurring).

[300] There are other, perhaps less realistic, possibilities. Congress could consider overriding *Franklin*. This could be done in a weaker form, applying the APA to the President when he works through an agency, to codify something akin to the rule I propose. Or the override could be done in a stronger form, applying the APA to the President whenever he exercises statutory power (but not when he exercises Constitutional power). To paraphrase Kathryn Kovacs, when the President acts like an agency, he should be treated like an agency. Such an override faces major obstacles. First, political will for overriding *Franklin* seems low. The case was decided nearly 30 years ago, so if it hasn't drawn a legislative response yet, it seems unlikely that one is forthcoming. Further, a bill applying the APA to the President would likely to draw a veto, meaning supermajorities in both chambers of Congress would be needed for an override. And even if the bill were passed, it could face Constitutional challenges. Supreme Court Justices who take a broad view of executive power might find an infringement on the Take Care Clause were Congress to give the courts power to decide whether every action of the President is arbitrary and capricious. And perhaps rightly so: when the highest elected official in the country makes a value judgment, perhaps it should not be second-guessed by an unelected judge. In this way, my proposal, while perhaps slightly more difficult to administer than simply applying the APA in full to the President, more fairly respects the balances between politics and expertise, between accountability to the will of the current electorate and accountability to the mandates of the former electorate as expressed through the statutory commands of Congress.

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never acts last, and the rule of *Franklin* would almost never apply. And as the critics of the last act approach note, it produces absurd results. The President's APA exemption is meaningless if challengers of presidential action can simply wait until one of the President's subordinates takes an implementing action and then obtain full APA review.

But while the presidential nature approach may be more faithful to *Franklin*'s text, it goes too far to the opposite extreme. By protecting any executive action that the President touches from APA review, the presidential nature approach threatens to significantly reduce the availability of effective judicial review for those harmed by agency action. In its deference to political accountability, this approach sacrifices too much legal accountability. Especially in the age of presidential administration, the presidential nature approach presents serious risks. A President who can use his directive authority over agencies to cut off APA review of the agencies' actions is a threat to the rule of law within the administrative state.

My proposal focuses on the nature of the action, but gives the tie between presidential nature and agency nature to the agency. My proposed rule is this: When agencies take actions to which the APA would otherwise apply, the President's involvement, as director or delegator or partner, should be no impediment. The simple motivation is that where the APA and its familiar doctrines apply naturally without stepping unnecessarily on the President's prerogatives, the APA should apply.

Thus, the *Franklin* exemption would be limited to situations in which:

- A statute delegates authority to the President by name AND
- The President acts under that statute by directly exercising discretion, even if subsequent acts by subordinates are required to implement the President's decision.

This rule is faithful to *Franklin*. When a statute gives authority to the President, especially when a statute calls for the President to exercise discretion, and the President exercises that authority himself, the APA should not apply. And a plaintiff should not be able to obtain APA review simply by suing a subordinate actor who takes a ministerial action to implement the President's orders.[301] In that case, nonstatutory review should apply.

In nearly every other scenario of joint presidential-agency action, the APA should apply. That is, where an agency takes a discretionary action, pursuant to a delegation of statutory authority from Congress or a subdelegation of statutory (but not constitutional) authority from the President, and that action is one that would otherwise be reviewable under the APA, then the APA should apply. The APA was created to provide a

[301] That is, unless those subordinates themselves exercise significant discretion. In that case, the APA would not apply to the President's portion of the action, but it should be possible to obtain APA review of the subordinate's discretionary act.

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judicial review regime for agency rulemaking and adjudication, and there is nothing about presidential administration that should change its applicability. In particular, rulemaking should in the vast majority if not all cases be considered agency in nature. It is a process that is peculiar to agency action under the APA and is never done directly by the President, so it doesn't make sense to consider rulemaking "presidential in nature" even when directed by the President.

In practice, this rule will often produce the same result as the last act camp. That is, for an agency action to be reviewable under the APA, it must be final. And if the President is responsible for a subsequent discretionary action, as in *Franklin*, that will render the agency action unreviewable. When the agency acts last, that will often create an action that is "agency in nature." *But not always*. As noted above, where the agent takes a subsequent action (especially if that action is ministerial) to implement a presidential directive within the President's own authority, the APA would not apply.

In this way, my proposal strikes a middle ground. Contra the presidential nature camp, I would apply the APA to bridge permits issued by the State Department. That is a prototypical agency adjudication, one for which the APA regime is well-tailored. There is no reason to reinvent the judicial review wheel, just because the statutory authority to issue the permits was initially granted to the President. Congress's intention in delegating to the President could just as (or more) easily have been to allow the President to decide which agency would carry out the task, rather than because Congress wanted to limit judicial review. On the other hand, contra the last act camp (and the Fourth Circuit's opinion in the travel ban case), I would not apply the APA to agents' actions implementing President Trump's discretionary statutory decisions to suspend travel and immigration from certain countries. However, if subordinates took discretionary actions to, for instance, implement the travel ban's waiver program, those administrative decisions should be subject to review.

In the hypothetical case of a President following the strong-sauce version of unitary executive theory and spending a day writing EPA rules or adjudicating benefit claims, I would apply the APA to the President. But unlike Kovacs, I would not apply the APA to the President every time he acts *like* an agency by exercising statutory power delegated to him by name. Just because the President is wielding statutory, rather than constitutional, power doesn't mean separation of powers concerns aren't relevant. And as noted above, the line between statutory and constitutional power is not always so clear. But I would apply the APA to the President when he acts *as* an agency by exercising authority that Congress gave to the agency. Congress's intention for the APA to govern administrative action should not so easily be subverted.

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As an additional step toward compromise, I suggest that the courts give more leeway to agencies to consider political influences, especially direction from the President on value choices. Nina Mendelson has argued that agencies should be required to disclose the extent to which political considerations influenced their decisions, but that in exchange for that transparency courts should give deference to the President's political influence.[302] This would help square *State Farm*, in which the majority voiced skepticism of politics as a justification for agency action, with *Chevron*, which justified granting deference to agency statutory interpretation in part on the political legitimacy of the President.[303]

C. Doctrinal Defense of the "Agency Nature" Rule

Doctrinally, applying the APA to as much agency action as possible while still respecting the separation of powers concerns that underlie *Franklin* is appealing for several reasons. Chief among them is administrability. In the absence of Congress stepping in to create a coherent review regime for presidential action, nonstatutory review is unreliable, as explained in Part I. APA doctrine developed over decades provides a familiar framework for reviewing agency action. And the APA framework itself balances accountability and discretion. It requires adherence to certain procedures, like notice and comment, which promote transparency and accountability to the public. And it keeps agency action within the bounds of law, by requiring compliance with statutes, and within the bounds of rationality, by requiring non-arbitrary decision-making. But within those bounds, agencies retain a great deal of discretion to make policy decisions, discretion that is and should be informed at least in part by presidential priorities. It is not controversial that review of agency action under the APA framework can coexist with at least some presidential oversight. Presidents have been exerting some level of influence over agencies for as long as those agencies have existed, certainly for the entire lifespan of the APA. For instance, the White House has been conducting cost-benefit analysis of major regulations for decades now, and courts have not hesitated to review rules that have passed through the OIRA process.

Concerns about protecting the President's constitutional powers and prerogatives are legitimate, but existing APA doctrines can do much of the work to safeguard the separation of powers. As in *Franklin*, the APA's finality requirement will prevent review of tentative, nonbinding, or advisory joint agency-presidential actions. Preclusion doctrine can limit review of

[302] Nina Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 Mich. L. Rev. 1127 (2010).

[303] *See* Kagan, supra note XX, at 2373.

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discretionary or political choices by the President. The APA precludes judicial review of agency action when a decision is "committed to agency discretion by law."[304] Courts will interpret a statute as committing a decision to agency discretion when there is "no law to apply" or "no meaningful standard."[305] Given their instinctual deference to the President, judges will be even more likely to find judicial review precluded on these grounds when the President acts than when an agency does.[306] And it seems reasonable to assume that Congress is more likely to intend power it delegates to the President to be committed to his political discretion. In *Dalton*, the Court precluded review because the statute in question committed the decision to the President's discretion.[307] It did so under nonstatutory review, but the same preclusion would have applied under the APA. At least in that regard, the choice of review regime is not dispositive, and the President's discretion will be equally well protected under the APA.

Further, both constitutional and statutory standing doctrine can prevent the APA's cause of action from subjecting all of the actions that the President takes in conjunction with an agency from being checked by a court for legality, which otherwise might raise concerns about the court infringing on the President's Take Care powers. But only when a plaintiff can meet the requirements for constitutional standing[308]—injury, causation, and redressability—and show that her interests are the type intended to be protected by the statute[309] will she be able to challenge the joint presidential-agency action.

The ability for courts to use the limitations of the APA, the constitution, and prudential considerations to limit review of presidential actions will prevent my proposal from making the Executive Branch subservient to the Judicial. Given the President's first-mover advantage over Congress and the Supreme Court, and the recent concentration of power in the executive branch, giving a bit more power to the courts, to be used to hold the Executive Branch accountable to Congress, might do more to facilitate the separation of powers than to constrain it, as discussed more fully in the next Section.

One potential argument in favor of the Presidential nature camp's doctrinal feasibility is that their rule would apply only to control, rather than supervision.[310] The idea would be something like this: When the President is

[304] 5 U.S.C. § 701(a)(2).
[305] *See, e.g.*, Webster v. Doe, 486 U.S. 592 (1988).
[306] And the Supreme Court did exactly that in *Dalton*.
[307] Dalton v. Specter, 511 U.S. 462, 476 (1994).
[308] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[309] *See* Lexmark International v. Static Control Components, 572 U.S. 118 (2014).
[310] For an argument that the President is dutybound to *supervise* agencies, see Gillian e. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836 (2015).

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just supervising agencies in their use of statutory power, the APA applies. Only when the President controls the agency does the exemption kick in. First, this view is difficult to square with the current caselaw. Where the President subdelegates his permitting authority to an agency and the agency then issues the permits without any input from the President, the President seems to be at most supervising. And yet a majority of courts have (in my view incorrectly) precluded APA review of those agency actions. More fundamentally, drawing the line for APA review between supervision and control raises difficult administrability concerns, because one is a variant of the other.[311] When supervision becomes more hands-on, it starts to look like control. And the point at which it passes from being one to being the other is even more difficult to discern than the line between agency and presidential action.

D. Political Defense of the "Agency Nature" Rule

Politically, my proposal helps enforce a balance between the branches of government without infringing on the President's constitutional prerogatives. Kagan and others have argued that the President's involvement gives greater political legitimacy to agency actions. But there is another side of that coin. The President taking control of the entire Executive Branch with reduced judicial review is itself a threat to separation of powers. It is good for agencies to be accountable to the President. But it is even better for them to be accountable to Congress, the body that passed the statutes empowering the Executive Branch to act in the first place. When the President exercises statutory powers, especially when he exercises statutory powers delegated to an agency or works together with an agency, his actions should be reviewed under the APA standard for compliance with Congress's laws. Otherwise too much power accumulates in the Executive Branch and the President takes power from both Congress and the courts.

Kagan is right that political influence from the President over agencies plays an important legitimating function. Congress often delegates power to agencies in incredibly broad terms, calling on the agency to regulate in a certain area in the public interest, but providing few specifics. Such broad delegations of lawmaking power call not for the narrow technocratic expertise of a bureaucrat but for the policymaking value judgments of an elected leader.[312] But despite broad support for some level of Presidential

[311] Perhaps significantly in this context, both Kagan and Mendelson use the terms "supervision" and "direction" somewhat interchangeably.

[312] Kagan, supra note XX, at 2353 ("[A]gency experts have neither democratic warrant nor special competence to make the value judgments—the essentially political choices—that underlie most administrative policymaking.").

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supervision, political influence over agencies can also be seen as delegitimating, especially when agencies should be making decisions based on technical or scientific evidence. As one example, Congressman Waxman responded to the revelation that certain EPA actions under the Clean Air Act were influenced by the President by calling the decision "pure politics," rather than "fair process that is based on the science, the facts, and the law . . . one of the critical pillars of our government."[313] Bill Eskridge and Lauren Baer have argued that a public opinion poll showing that 51 percent of Americans opposed assisted suicide would not have made John Ashcroft's interpreting the Controlled Substances Act to outlaw assisted suicide any more legitimate.[314]

Regardless of where one comes out on the debate about the proper level of the President's political influence over agency action, that political influence is not so legitimating that it renders judicial review for compliance with law unnecessary or superfluous. As Peter Strauss has argued, permitting executive branch discretion in a form that is "legally uncontrollable" raises serious legitimacy concerns, which might be even more significant than the concerns raised by insufficient political accountability.[315] Strauss argues that a lack of *legal* accountability has serious implications for "what it means to have a government under laws."[316] Thomas Merrill argues that "presidential administration" theories have emphasized administrative law's "process tradition," which emphasizes reasoned decision-making and legitimacy through public input, to the detriment of its "positivist tradition," which emphasizes that "administrative bodies are created by law and must act in accordance with the requirements of the law."[317] My proposal balances these concerns. It recognizes the value of the President's politically legitimating

[313] Hearing on EPA's New Ozone Standards Before H. Comm. on Oversight and Government Reform, 110th Cong. 1 (2008), (statement of Rep. Waxman, Chairman, H. Comm. on Oversight and Government Reform), available at http:// purl.access.gpo.gov/GPO/LPS111049.

[314] William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan, 96 GEO. L.J. 1083, 1166 (2008)

[315] Peter L. Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 704 (2007).

[316] *Id. See also* Peter Strauss, *Legislation that Isn't—Attending to Rulemaking's Democracy Deficit*, 98 Calif. L. Rev. 1351 (2010) (arguing that proponents of the unitary executive theory subscribe to "Chief Justice Marshall's characterization of the Secretary of State's foreign affairs function, as a realm in which the officer 'is to conform precisely to the will of the President"' without noticing "the unreviewability that Chief Justice Marshall said would follow from this proposition, or its tension with the ideas of § 706, *Overton Park*, and *State Farm*.").

[317] Thomas Merrill, Presidential Administration and the Traditions of Administrative Law, 115 COLUM. L. REV. 1953 (2015)

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influence over agency decision-making by affording deference within the APA framework to his political influence. But it also recognizes that compliance with the President's directives is no substitute for compliance with law. The APA therefore must apply to agency actions, regardless of the President's oversight or control of the agency's decisions.

One might argue that Congress does not intend the APA to apply when it delegates power to the President initially, even when he redelegates that power to agencies. But even when Congress chooses to delegate to the President, that does not necessarily mean it intended the APA not to apply. For one thing, many statutes delegating power to the President were passed before *Franklin* was decided. It seems unrealistic to impute knowledge of how that case would eventually come out to Congress at the time it was making those laws. Further, as previously discussed, historically Congress delegated all administrative authority to the President in name. It seems unlikely that was intended to commit every administrative action to the President's discretion. A more plausible explanation is that when Congress delegates authority to the President in name, it does not expect him to exercise the authority himself. Rather, the choice that is actually being delegated to the President is which agency should be assigned the authority.[318] Under my proposal, the President's choice of which agency ought to receive the authority is not reviewable under the APA (or likely at all), but the APA would apply to the receiving agency's discretionary use of the power.

CONCLUSION

Though not perfect, the APA has provided the dominant framework for administrative lawmaking for three-quarters of a century. Over time, the compromises embedded in the statute have made it a durable and flexible tool. In the era of Presidential administration, it is important to cabin the President's exemption from the APA so that the exception does not swallow the rule. Even when the President is involved, nearly all agency actions to which the APA would otherwise apply should be reviewed within that traditional framework.

That brings us back to President Obama and DAPA. If he had written the memo creating the program on his own letterhead, would that have exempted the decision from the APA and therefore from the notice and comment requirement? Under my proposal, the answer is no. The letterhead is not dispositive. Congress delegated responsibility for executing the portion

[318] *See* Mendelson, *supra* note XX, at 1138 n.20 ("An alternative interpretation of Congress's decision to use the word 'President' in a delegation, for example, is simply that it wishes to authorize the President to select which executive branch agency is the most appropriate implementer of a statute.").

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of the immigration laws at issue in the case to the Secretary of Homeland Security. If the President takes on the Secretary's statutory authority, then he takes on the requirements of the APA as well. Of course, that case might still have been wrongly decided for another reason, perhaps because the APA should not have applied to the agency's exercise of prosecutorial discretion at all. But the name at the end of the memo cannot decide whether the APA applies.

Likewise, the Trump Administration's argument that DHS's rescission of the parole program for Central American Minors cannot be overturned because of the President's plenary power over immigration policy is plainly incorrect. The APA applies to that agency decision, regardless of whether it was influenced or directed by the President. The relevant standard is not the government's proposed rational basis review, which should be reserved for constitutional challenges, but rather the hard-look arbitrary-and-capricious review of the APA, the hallmark of judicial review of agencies' statutory actions.

Respect for the separation of powers requires that the courts defer to the President's discretionary choices when appropriate. But it also requires that the President not manipulate *Franklin* to avoid accountability to the courts and Congress. Exempting the President from the APA when he exercises his own statutory authority, but not when he works together with an agency to exercise its statutory authority, is the best way to strike this balance.

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