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## Constraining the Statutory President

Kathryn E. Kovacs  
*Rutgers Law School*

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# CONSTRAINING THE STATUTORY PRESIDENT

KATHRYN E. KOVACS\*

## ABSTRACT

*When agencies make decisions that are binding on the public, they must provide public notice, accept and consider public comments, and provide explanations for their final decisions. Their actions are then subject to judicial review to ensure that they acted within the scope of their authority and the decision was not arbitrary or capricious.*

*The President, however, is not subject to such constraints, even when exercising purely statutory authority, i.e., acting as the “Statutory President.” That autonomy is due to the Supreme Court’s holding in Franklin v. Massachusetts that the President is not an “agency” under the Administrative Procedure Act (APA). Thanks to Franklin, the President exercises delegated authority to make policy decisions that have enormous implications for the public without the public involvement, transparency, deliberation, and political and judicial accountability that we demand when agencies make such decisions.*

*This Article is the first to take Franklin v. Massachusetts head on. It demonstrates that the Court’s 1992 holding conflicts with the plain language and history of the APA; it explains the flaws in the Court’s constitutional analysis; and it presents the normative case for treating the Statutory President like any other agency.*

*Having shown that Franklin was wrong, this Article sketches a new model for treating the Statutory President like an “agency” under the APA. It concludes by explaining how both the process and outcome of Trump v. Hawaii, in which the Supreme Court upheld the President’s order barring immigration from certain Muslim-majority nations, would have been different had the President been subject to the APA.*

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\* Professor, Rutgers Law School, The State University of New Jersey. Thanks to Nick Bagley, Jack Beerermann, Elena Chachko, Bridget Dooling, Joshua Galperin, Kristin Hickman, Rebecca Ingber, Matthew Lawrence, Gillian Metzger, Richard Murphy, Linda Meyer, David L. Noll, Eloise Pasachoff, Nick Parrillo, Zachary Price, Michael Sant’Ambrogio, Charlotte Schneider, Miriam Seifter, Bijal Shah, Peter Shane, Kevin Stack, Glen Staszewski, Jed Stiglitz, Wendy Wagner, Chris Walker, Daniel Walters, Jason Yackee, and participants at the Administrative Law New Scholarship Roundtable at the University of Wisconsin and the faculty colloquium at Rutgers Law School in Newark. ©Kathryn E. Kovacs 2020.

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## INTRODUCTION

Congress is the primary policymaker in the United States government, but it often delegates authority to make binding decisions to the President.<sup>1</sup>

1. See Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821, 828 (2013).

The Supreme Court observed in 1936 that nearly every volume of the U.S. Statutes contained a statute authorizing the President to take particular actions.<sup>2</sup> Congress has delegated authority to the President to take action in wartime, in other emergencies,<sup>3</sup> and “in the name of national security.”<sup>4</sup> The President also acts as Congress’s delegate when taking certain actions with respect to immigration,<sup>5</sup> trade,<sup>6</sup> and federally owned lands,<sup>7</sup> among many others.

Kevin Stack dubbed the President when acting pursuant to statutory authority “the statutory president.”<sup>8</sup> As Colin Diver explained, “[t]he President acts as delegate when he carries out specific operational responsibilities conferred upon him or his office by statute.”<sup>9</sup> When acting as Congress’s statutory delegate, “the President occupies a position quite similar to that of any other administrative officer in that his legal sanction to carry out those responsibilities is derived solely from the enacted law.”<sup>10</sup> Unlike an administrative agency, however, the Statutory President is not subject to the Administrative Procedure Act of 1946 (APA).<sup>11</sup>

The APA codified a monumental compromise.<sup>12</sup> It was an extraordinary moment of deliberative democracy, following years of debate between Congress, dozens of federal agencies, the American Bar Association, and other interested parties.<sup>13</sup> The Act essentially legitimated the administrative state through process and judicial review. The Supreme Court and congressional conservatives accepted the new reality that statutes would delegate congressional authority to administrative agencies. They gave their

2. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 324 (1936).

3. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 748 n.182 (2008); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2072 (2005).

4. Amy L. Stein, *A Statutory National Security President*, 70 FLA. L. REV. 1183, 1193 (2018).

5. See, e.g., Immigration and Nationality Act § 212, 8 U.S.C. § 1182(f) (2018); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 511–19 (2009).

6. See generally Kevin C. Kennedy, *Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion*, 20 CORNELL INT’L L.J. 127, 129 (1987) (focusing “on the legislative wisdom of Congress in delegating discretionary authority to the President in the international trade field”).

7. See, e.g., Outer Continental Shelf Lands Act § 12(a), 43 U.S.C. § 1341(a) (2018); Antiquities Act § 2, 54 U.S.C. § 320301 (2018).

8. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005) [hereinafter Stack, *Statutory President*]. The President’s actions taken pursuant to constitutional authority or statutory authority delegated to another federal officer are beyond the scope of this Article. I refer to the President when acting pursuant to statutory authority as the “Statutory President.”

9. Colin S. Diver, *Commentary, Presidential Powers*, 36 AM. U. L. REV. 519, 521 (1987).

10. *Id.* at 522; see also Stack, *Statutory President*, *supra* note 8, at 542.

11. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551–706 (2018)); see also *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

12. See *infra* text accompanying notes 197–200, 248.

13. See Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1223–27 (2015) [hereinafter Kovacs, *Superstatute Theory*].

approval on the condition that the exercise of such delegated power would be subject to procedural constraints and judicial review.<sup>14</sup> That bargain permeated the APA, which has since become the constitution for the administrative state.<sup>15</sup> Thus, when federal government agencies make binding decisions, they must satisfy the APA's procedural requirements, and their decisions are subject to judicial review under the APA.

The Supreme Court held in *Franklin v. Massachusetts*, however, that the President is not an "agency" under the APA.<sup>16</sup> Therefore, the Statutory President's actions are not subject to the APA's procedural requirements or judicial review provisions.<sup>17</sup> For example, when Donald Trump assumed the presidency, he issued a series of orders limiting immigration from certain Muslim-majority nations pursuant to his authority under the Immigration and Nationality Act (INA).<sup>18</sup> Unlike an agency, he did not publish a proposed order, solicit and consider public input, or even explain his decision fully.<sup>19</sup> The President made his decision in a black box, with little deliberation and no transparency.

Judicial review of the Statutory President's actions is available but is constrained significantly. When the Supreme Court reviewed President Trump's final immigration order in *Trump v. Hawaii*, it decided that the President made the finding the INA required: that allowing the specified people to enter the country "would be detrimental to the interests of the United States."<sup>20</sup> But the Court did not decide whether that finding was reasonable and consistent with the record.<sup>21</sup> In other words, the Court limited its inquiry to determining that the President had acted within the scope of the statutory delegation; it did not determine whether the President's order was arbitrary, capricious, or an abuse of the discretion Congress granted by statute, as it would have if the order had come from an agency.<sup>22</sup>

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14. See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447–48 (1987); David S. Tatel, Remarks, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2–3 (2010).

15. See Kovacs, *Superstatute Theory*, *supra* note 13, at 1208.

16. *Franklin*, 505 U.S. at 800–01.

17. See Stack, *Statutory President*, *supra* note 8, at 552 (“[T]here are almost no legally enforceable procedural requirements that the president must satisfy before issuing (or repealing) an executive order or other presidential directive.”).

18. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2403–06 (2018).

19. *Cf. id.* at 2409 (dismissing as “questionable” the premise that the President must explain his findings “with sufficient detail to enable judicial review” (citing *Webster v. Doe*, 486 U.S. 592, 600 (1988))).

20. *Id.* at 2408 (quoting 8 U.S.C. § 1182(f) (2018)).

21. *Id.* at 2409.

22. *Id.* at 2408–10.

Unilateral presidential action is not a new phenomenon.<sup>23</sup> In recent years, though, presidents increasingly have exercised statutory authority without following the APA's procedural mandates and without full judicial review.<sup>24</sup> President Obama, for example, issued Executive Orders relying on delegated authority to prohibit the import of jade and rubies from Burma,<sup>25</sup> prohibit federal employees from texting while driving on the job,<sup>26</sup> and block the property of individuals deemed to have contributed to the conflict in Somalia.<sup>27</sup> He also used statutory power to create twenty-nine national monuments<sup>28</sup> and declare twelve national emergencies.<sup>29</sup> He redirected up to \$70 million to meet "unexpected urgent refugee and migration needs,"<sup>30</sup> determined that it was in the national interest to admit up to 110,000 refugees in fiscal year 2017,<sup>31</sup> and entered into the Trans-Pacific Partnership Agreement.<sup>32</sup>

President Trump exercised statutorily delegated powers to withdraw from the Trans-Pacific Partnership Agreement,<sup>33</sup> block all property of the Government of Venezuela,<sup>34</sup> incentivize domestic production of rare earth metals,<sup>35</sup> impose a twenty-five percent duty on imported steel,<sup>36</sup> regulate the acquisition and use of technology from foreign adversaries,<sup>37</sup> sequester agency appropriations across the board,<sup>38</sup> cap the admission of refugees for 2020 at 18,000 people,<sup>39</sup> bar the immigration of people who do not have health insurance,<sup>40</sup> bar Europeans from traveling to the U.S.,<sup>41</sup> and redirect

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23. PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 20 (2d ed. 2014) ("Rule by presidential decree has been the subject of serious controversy since the administration of George Washington, and the debates continue.").

24. See Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 *ADMIN. L. REV.* 515, 560–62 (2018) [hereinafter Kovacs, *Rules About Rulemaking*].

25. Exec. Order No. 13,651, 78 *Fed. Reg.* 48,793 (Aug. 6, 2013).

26. Exec. Order No. 13,513, 74 *Fed. Reg.* 51,225 (Oct. 1, 2009).

27. Exec. Order No. 13,536, 75 *Fed. Reg.* 19,869 (Apr. 12, 2010).

28. CAROL HARDY VINCENT, *CONG. RESEARCH SERV.*, R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 2 (2018).

29. L. ELAINE HALCHIN, *CONG. RESEARCH SERV.*, 98-505, NATIONAL EMERGENCY POWERS 12 (2020).

30. Presidential Determination No. 2016–05, 81 *Fed. Reg.* 68,925 (Jan. 13, 2016).

31. Presidential Determination No. 2016–13, 81 *Fed. Reg.* 70,315 (Sept. 28, 2016).

32. Notice of Intention to Enter into the Trans-Pacific Partnership Agreement, 80 *Fed. Reg.* 69,561 (Nov. 5, 2015).

33. Memorandum on Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement, 82 *Fed. Reg.* 8497 (Jan. 23, 2017).

34. Exec. Order No. 13,884, 84 *Fed. Reg.* 38,843 (Aug. 5, 2019).

35. Presidential Determination No. 2019–20, 84 *Fed. Reg.* 35,975 (July 22, 2019); see also 50 U.S.C. § 4533.

36. Proclamation No. 9894, 84 *Fed. Reg.* 23,987 (May 19, 2019).

37. Exec. Order No. 13,873, 84 *Fed. Reg.* 22,689 (May 15, 2019).

38. Sequestration Order for Fiscal Year 2020, 84 *Fed. Reg.* 10,401 (Mar. 18, 2019).

39. Presidential Determination No. 2020–04, 84 *Fed. Reg.* 65,903 (Nov. 1, 2019).

40. Proclamation No. 9945, 84 *Fed. Reg.* 53,991 (Oct. 4, 2019).

41. Proclamation No. 9993, 85 *Fed. Reg.* 15,045 (Mar. 11, 2020).

billions of dollars appropriated for military construction to building a wall between the U.S. and Mexico.<sup>42</sup>

Despite these developments, scholars take *Franklin's* holding as a given,<sup>43</sup> and those who address presidential administration tend to focus on judicial review.<sup>44</sup> But *Franklin's* analysis was flawed, and there is far more to the APA than judicial review. As Kevin Stack observed, “[p]rocedure provides a check on the potential abuses of statutory delegations, and its absence, particularly when the president is involved, may raise a concern about the arbitrary exercise of power.”<sup>45</sup> Yet, Stack advocated elsewhere for a limited form of judicial review for the Statutory President, and he proposed no procedural requirements.<sup>46</sup>

This Article is the first to take *Franklin* head on.<sup>47</sup> It argues that *Franklin* was wrong and that the Statutory President should be subject to the APA’s procedural and judicial review provisions. A President who acts pursuant to a congressional delegation of authority should be subject to the same constraints as any other statutory delegate. In the words of Douglas Adams, “If it looks like a duck, and quacks like a duck, we have at least to consider the possibility that we have a small aquatic bird of the family *Anatidæ* on

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42. Proclamation No. 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019); see also Leo Shane III, *White House Promises Using Military Funds to Build Trump’s Border Wall Won’t Hurt Force Readiness*, MILITARYTIMES (Feb. 15, 2019), <https://www.militarytimes.com/news/pentagon-congress/2019/02/15/white-house-promises-using-military-funds-to-build-trumps-border-wall-wont-hurt-force-readiness/> [https://perma.cc/GMD4-458K]; cf. Jacey Fortin, *Trump Mentions a Wall in Colorado, Then Says He Was Kidding*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/trump-wall-colorado.html> [https://perma.cc/S3GA-3GJC].

43. David M. Driesen, *Judicial Review of Executive Orders’ Rationality*, 98 B.U. L. REV. 1013, 1016–17, 1036, 1040, 1058 (2018); Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1747, 1778, 1799 (2019); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2223 (2018); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 831 & n.19 (2019); Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1617 (1997); Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1173 (2009) [hereinafter Stack, *Reviewability*]; Stack, *Statutory President*, *supra* note 8, at 560–61; Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 753 n.236 (2007). *But see* Bernard Schwartz, *“Apotheosis of Mediocrity”?* *The Rehnquist Court and Administrative Law*, 46 ADMIN. L. REV. 141, 170–71 (1994).

44. See, e.g., Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1 (1982); Driesen, *supra* note 43; Alan Morrison, *Presidential Actions Should Be Subject to Administrative Procedure Act Review*, in RETHINKING ADMIN LAW: FROM APA TO Z 17, 21 (2019), <https://www.acslaw.org/wp-content/uploads/2019/06/Rethinking-Admin-Law-From-APA-to-Z.pdf>; Stack, *Reviewability*, *supra* note 43.

45. Stack, *Statutory President*, *supra* note 8, at 591.

46. Stack, *Reviewability*, *supra* note 43, at 1177, 1199.

47. *But see* Kathryn E. Kovacs, *Trump v. Hawaii: A Run of the Mill Administrative Law Case*, 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/> [https://perma.cc/N2E3-U9RH] (arguing that *Franklin* should be overturned); Morrison, *supra* note 44, at 17–18 (arguing that *Franklin* should be overturned with regard to judicial review).

our hands.”<sup>48</sup> If the President looks like an agency and acts like an agency, they might be an agency.<sup>49</sup> Even if they are not actually an agency, perhaps they should be treated like one.<sup>50</sup>

Like any agency, the Statutory President should be constrained both procedurally and judicially. Nicholas Bagley correctly criticized administrative law’s fetish with procedure.<sup>51</sup> On the other hand, Chris Walker is also correct that administrative law is over-reliant on judicial review: “it is a mistake to fixate on courts.”<sup>52</sup> Both procedure and judicial review are critical to constraining the Statutory President effectively.

No doubt, Lisa Bressman and Michael Vandenberg also are correct that “presidential control is more complex than scholars generally have acknowledged.”<sup>53</sup> Members of the Office of Management and Budget and others in the Executive Office of the President certainly wield considerable influence in decisionmaking. Thus, Nina Mendelson appropriately cautioned that “references to the President ought to include ‘his immediate policy advisors in OMB and the White House.’”<sup>54</sup> Nonetheless, the specific question of whether the Statutory President is an agency under the APA requires an answer. Whether other parts of the Executive Office of the President are agencies raises separate issues that require separate treatment.<sup>55</sup>

This Article proceeds as follows. Part I tells the story of *Franklin v. Massachusetts* and describes its fallout. Because the case concerned the decennial census, the schedule in the Supreme Court was tight. The Supreme Court decided the case in only two months and with inadequate briefing on the question of whether the President is an “agency” under the

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48. DOUGLAS ADAMS, *DIRK GENTLY’S HOLISTIC DETECTIVE AGENCY* 270 (1987).

49. I use “they” as a singular pronoun in this Article. “The use of genderneutral pronouns such as ‘they, them, and theirs’ to describe an individual person is growing in acceptance.” Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 896 (2019); see also *Words We’re Watching: Singular ‘They’*, MERRIAM-WEBSTER: WORDS AT PLAY, <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> [<https://perma.cc/J32M-J969>]; Jessica Bennett, *She’s the Next President. Wait, Did You Read That Right?*, N.Y. TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/us/politics/woman-president-she-her.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/F4J3-8U7Z>].

50. Cf. *Partnerships: Ways-Means Chairman Rostenkowski Says Nature of MLP Deals Will Determine Tax Treatment*, [1987] DAILY TAX REP. (BNA) No. 181, at G-6 (Sept. 21, 1987) (“In other words, if it looks like a duck, walks like a duck, and sounds like a duck, it ought to be taxed as a duck.”).

51. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

52. Christopher Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1624 (2018).

53. Lisa Schultz Bressman & Michael P. Vandenberg, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 69 (2006).

54. Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1147 (2010) (quoting Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2338 (2001)).

55. Cf. 5 U.S.C. § 552(f)(1) (2018) (provision of the Freedom of Information Act defining “agency” to include the Executive Office of the President).



APA. From the currently available papers of the Justices, it appears that the Court did not examine the issue closely.<sup>56</sup> Indeed, the Court easily could have avoided the question entirely. Instead, it held that the APA does not cover the President and reiterated that ill-considered holding two years later in *Dalton v. Spector*.<sup>57</sup> Those decisions have yielded a circuit split on the scope of the federal courts' authority to review the Statutory President's decisions.<sup>58</sup>

Part II explains why the Supreme Court was wrong when it held in *Franklin* that the APA does not cover the President. The text plainly includes the President: it defines "agency" broadly as "each authority" of the U.S. government and expressly exempts Congress, the courts, and the District of Columbia, among others, but it does not exempt the President. The statutory history reinforces the breadth of the text. The official legislative history explained that anyone with "the real power to act" is an agency. In addition, a major administrative reform bill that passed both houses of Congress in 1940 expressly exempted the President, but Congress abandoned that exemption in the APA.<sup>59</sup>

Part II further explains the errors in the Court's constitutional analysis. Allowing the Statutory President to make decisions that are binding on the public without procedural safeguards and judicial supervision undermines the central bargain underlying the APA and shakes the foundation upon which the administrative state is built. The Court also failed to recognize that privileges and exemptions would insulate the President's core constitutional functions from the APA.<sup>60</sup> Finally, Part II explains how times have changed since 1946 and even since the Court decided *Franklin* in 1992. Presidents now make binding law in contexts and to an extent that seem not to have been anticipated.<sup>61</sup>

Part III then provides a normative argument for overturning *Franklin*. To further the values underlying the APA's procedural requirements—public participation, political accountability, transparency, deliberation, and uniformity—the Statutory President should be treated like any other congressional delegate. Subjecting the Statutory President to judicial review under the APA would further advance APA values and counterbalance Congress's delegations of its authority.

Part IV constructs a new model for treating the Statutory President like an "agency" under the APA. It traces *Trump v. Hawaii* from President

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56. See *infra* Part I.B & C.

57. See *infra* Part I.D & E.

58. See *infra* Part I.F.

59. See *infra* Part II.A & B.

60. See *infra* Part II.C.

61. See *infra* Part II.D.

Trump's first "travel ban" through the Supreme Court's judgment upholding the third iteration of that order. Then it explains how things would have been different had the President been subject to the APA: the President would have provided advance notice of his intended policy, sought and considered public comments, and explained his decision; the administrative record would have included some presidential documents; and perhaps the Court would have scrutinized Trump's stated justification for the policy more closely.

Finally, the conclusion visits the question of how the Supreme Court or Congress could reverse *Franklin*. It refutes the notion that stare decisis would prevent the Supreme Court from changing course. Alternatively, it urges Congress to amend the APA to clarify that the President is an "agency." In closing, this Article admonishes Congress to revisit its practice of delegating final decisionmaking authority to an unconstrained President. Failing to curb the Statutory President will further enable our nation's descent into authoritarianism.

### I. *FRANKLIN V. MASSACHUSETTS*

The Supreme Court in *Franklin* had little time and insufficient briefing to consider adequately the question of whether the APA covers the President. Its hasty decision has since spawned a circuit split on the extent to which federal courts may review presidential decisions.

#### A. *Pre-Franklin*

The APA defines the term "agency" as:

each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
  - (B) the courts of the United States;
  - (C) the governments of the territories or possessions of the United States;
  - (D) the government of the District of Columbia;
- or except as to the requirements of section 552 of this title—
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix.<sup>62</sup>

In 1971, the D.C. district court, citing works by Raoul Berger, Kenneth Culp Davis, and Louis Jaffe, stated that administrative law scholars “seem to be in agreement that the term ‘agency’ in the APA includes the President.”<sup>63</sup> But the court there did not decide the question.<sup>64</sup> Courts continued to display “reluctance to decide the question”<sup>65</sup> until 1991, when the D.C. Circuit held in *Armstrong v. Bush* that “the [APA’s] textual silence, when read against the backdrop of the legislative history of the APA and the canons of construction applicable to statutes that implicate the separation of powers” indicates “that Congress did not intend to subject the President to the APA.”<sup>66</sup> The court required “affirmative evidence that these issues were considered in the legislative process” and insisted that if Congress intended to cover the President, it should have made its intent clear.<sup>67</sup> The court found insufficient evidence to meet that standard.<sup>68</sup>

### B. Briefing and Argument

The following year, a three-judge district court in Massachusetts held that counting overseas federal employees in the 1990 census for the purpose of apportioning seats in the House of Representatives violated the APA.<sup>69</sup>

62. 5 U.S.C. § 551 (2018).

63. *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (citing Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965, 997 (1969); Kenneth Culp Davis, *Administrative Arbitrariness—A Postscript*, 114 U. PA. L. REV. 823, 832 (1966); Louis L. Jaffe, *The Right to Judicial Review II*, 71 HARV. L. REV. 769, 778, 781 (1958)). *But cf.* Bruff, *supra* note 44, at 23–24.

64. *Amalgamated Meat Cutters & Butcher Workmen*, 337 F. Supp. at 761.

65. *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 (Temp. Emer. Ct. App. 1974). In 1980, the D.C. district court held that the Emergency Petroleum Allocation Act explicitly subjected the President’s decision to implement a gasoline conservation fee to section 553 of the APA. *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 619 (D.D.C. 1980). The following year, the Puerto Rico district court held that the President is subject to the National Environmental Policy Act, which applies to “agencies” as defined in the APA. *Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1057–58 (D.P.R.), *vacated on other grounds sub nom. Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981).

66. *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991).

67. *Id.*

68. *Id.*

69. *Massachusetts v. Mosbacher*, 785 F. Supp. 230, 268 (D. Mass.), *rev’d sub nom. Franklin v. Massachusetts*, 505 U.S. 788 (1992).

The district court did not discuss the question of whether the President is an “agency” under the APA.

On appeal to the Supreme Court, the parties did not brief the issue fully, which is not surprising given the tight schedule. The federal defendants filed their notice of appeal on March 16, 1992.<sup>70</sup> The parties filed opening briefs simultaneously on April 13, 1992<sup>71</sup> and reply briefs on April 20, 1992.<sup>72</sup> The Court heard oral argument the following day and handed down its unanimous judgment reversing the district court on June 26, 1992.<sup>73</sup>

The U.S. Solicitor General (SG) argued that Massachusetts’ challenge to the apportionment of representatives was not subject to judicial review under the APA.<sup>74</sup> The Secretary of Commerce’s census report to the President, he reasoned, was the only possible final agency action at issue and was unreviewable because it was committed to agency discretion under 5 U.S.C. § 701(a)(2).<sup>75</sup> It is the President’s subsequent report to Congress that determines the apportionment of representatives, the SG continued, and that report is not subject to review under the APA either.<sup>76</sup> The SG argued that “the President is not even an ‘agency’” under the APA, relying on the D.C. Circuit’s opinion in *Armstrong v. Bush*.<sup>77</sup>

In a footnote, the Solicitor General elaborated that Title 3 of the U.S. Code addresses presidential functions, not Title 5, and that “[t]he term ‘agency’ would be a peculiar way to refer to the President in any event” because he is the principal, not the agent.<sup>78</sup> The 1941 report of the Attorney General’s Committee on Administrative Procedure,<sup>79</sup> the SG continued, was “[c]onsistent with this view” in that it “distinguished the President’s functions from those of the agencies to which the APA would be addressed.”<sup>80</sup>

The Appellees did not respond on the merits, arguing instead that the issue was irrelevant because “[t]he President played no apparent role in the decision to apportion overseas employees to states.”<sup>81</sup>

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70. Docket, *Massachusetts v. Mosbacher*, 785 F. Supp. 230, 268 (D. Mass. 1992) (No. 1:91-CV-11234).

71. Docket, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

72. *Id.*

73. *Id.*

74. Brief for Appellants at 17, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

75. *Id.* at 17, 28.

76. *Id.* at 29.

77. *Id.* at 29–30.

78. *Id.* at 30 n.16.

79. See *infra* text accompanying note 314.

80. Brief for Appellants at 30 n.16, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502) (citing COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 100 (1941)).

81. Brief for Appellees at 113 n.36, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

At the oral argument, then Deputy Solicitor General John G. Roberts, Jr. asserted repeatedly that the President is not an “agency” under the APA.<sup>82</sup> He contended that even if the President’s report to Congress were final, it would not be subject to review because the President is not an “agency” under the APA.<sup>83</sup> He ended his opening argument on the point: “since there is no review of the President’s action under the APA, there is no review of his action in this case, and since his action is indispensable to harm to Massachusetts, the case is not justiciable.”<sup>84</sup> He even confronted Massachusetts directly by saying: “the President is not an agency subject to suit under the APA, and I don’t understand Massachusetts to challenge that submission here.”<sup>85</sup> Neither the Commonwealth nor any Justice challenged Roberts on the point.<sup>86</sup> The Massachusetts Assistant Attorney General focused on the merits of the constitutional claim for his entire argument.<sup>87</sup>

### C. *The Supreme Court’s Decision*

From the currently available papers of the Justices, including conference notes, memoranda, and draft opinions,<sup>88</sup> it appears that the Court did not examine closely the question of whether the President is an “agency” under the APA. They did not discuss this precise issue at the conference on April 24, 1992.<sup>89</sup> A majority of the justices expressed the view that the case was unreviewable.<sup>90</sup> Justice O’Connor’s first draft of the Court’s opinion supporting that view, circulated on May 27, 1992, stated that “the final action complained of is that of the President, and the President is not an

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82. Transcript of Oral Argument at 10, 11–13, 21, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

83. *Id.* at 13.

84. *Id.* at 21–22.

85. *Id.* at 10.

86. *See id.* at 10–50.

87. *Id.* at 22–50.

88. I work on the assumption that Justice Blackmun’s file contains a complete record of the Court’s discussion in this case. It is of course possible that Justice O’Connor’s file, when it becomes public, will reveal additional judicial deliberation. Justice O’Connor’s individual case files at the Library of Congress will remain closed “during the service of any justice who participated in the case.” FEDERAL JUDICIAL CENTER, A GUIDE TO THE PRESERVATION OF FEDERAL JUDGES’ PAPERS 32–33 (3d ed. 2018), [https://www.fjc.gov/sites/default/files/materials/36/Guide\\_to\\_Preservation\\_of\\_Federal\\_Judges\\_Papers\\_Third\\_Public.pdf](https://www.fjc.gov/sites/default/files/materials/36/Guide_to_Preservation_of_Federal_Judges_Papers_Third_Public.pdf) [<https://perma.cc/HC7N-SN6X>]. In addition to Justice O’Connor herself, Justice Thomas also participated in *Franklin*. *See Franklin*, 505 U.S. at 788.

89. *See* Justice Harry A. Blackmun, Conference Notes in *Franklin v. Massachusetts* (April 24, 1992) (on file with Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 603, file 91-1502).

90. *Id.*

agency within the meaning of the Act.”<sup>91</sup> Accordingly, there was no final agency action for the Court to review.<sup>92</sup>

She continued:

The President is not explicitly excluded from the APA’s purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President’s performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements. Although the President’s actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA.<sup>93</sup>

That paragraph ended up in the Court’s final opinion.<sup>94</sup> Justices Rehnquist, White, Scalia, and Thomas joined this part of Justice O’Connor’s opinion.<sup>95</sup>

The remaining four justices were of the view that the Secretary’s report to the President was the final agency action.<sup>96</sup> Accordingly, they saw no need to address the question of whether the President is an “agency” under the APA.<sup>97</sup> They concurred in the judgment on the merits nonetheless, concluding that the Secretary had not exceeded his discretion.<sup>98</sup>

Justice O’Connor’s opinion went on to hold against Massachusetts on the merits of its constitutional claim.<sup>99</sup> All of the Justices joined that part of the opinion except Justice Scalia, who believed that Massachusetts lacked standing.<sup>100</sup>

#### *D. Avoiding the Issue*

The majority could have avoided the question of whether the President is an “agency” under the APA. It could have held that even if the President

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91. Justice Sandra Day O’Connor, Draft Opinion in *Franklin v. Massachusetts* 7 (May 27, 1992) (on file with Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 603, file 91-1502).

92. *See id.*

93. *Id.* at 11 (citations omitted).

94. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

95. *Id.* at 789–90.

96. *Id.* at 807 (Stevens, J., concurring).

97. *Id.* at 807, 816 n.15 (Stevens, J., concurring).

98. *Id.* at 807.

99. *Id.* at 806 (O’Connor, J., concurring).

100. *Id.* at 824 (Scalia, J., concurring).

is an “agency,” the President’s action was exempt from judicial review because it was committed to his discretion.<sup>101</sup> The relevant statute required, and still requires, the President to

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 would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions . . . .<sup>102</sup>

In her memorandum accompanying the initial draft of the majority opinion, Justice O’Connor explained that she believed that the *President* had some discretion, and thus there was no final agency action.<sup>103</sup> In other words, the Secretary’s report could not be considered final because the President retained discretion to determine “what ‘the census’ ultimately says.”<sup>104</sup>

Justice O’Connor’s initial draft of the majority opinion, however, took a different tack. After stating that the President is not an agency, Justice O’Connor went on to state in the alternative that the census report was committed to the *Secretary’s* discretion and thus unreviewable under the APA.<sup>105</sup>

Ultimately, the majority opinion followed the reasoning in Justice O’Connor’s memo. It emphasized that while the apportionment calculation is ministerial, under the statute, the President retains discretion to steer the policy judgments underlying the census.<sup>106</sup> Thus, the President’s report to Congress was the final action, not the Secretary’s report to the President.<sup>107</sup>

Justice O’Connor could have said that regardless of whether the President is an “agency” or not, the final decision was unreviewable because it was committed to the President’s discretion.<sup>108</sup> That would have enabled the Court to reach the same judgment without deciding whether the President is an “agency” under the APA. One might quibble with the extent to which the statute cabins the President’s discretion, but certainly that

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101. See 5 U.S.C. § 701(a)(2) (1988).

102. 2 U.S.C. § 2a(a) (2018); 2 U.S.C. § 2a(a) (1988).

103. Memorandum from Justice Sandra Day O’Connor on Draft Opinion in *Franklin v. Massachusetts* to The Chief Justice (June 5, 1992) (on file with Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Box 603, file 91-1502).

104. *Id.*

105. Compare *id.* with Justice Sandra Day O’Connor, *supra* note 91 (draft opinion manuscript at 11) (“Even if we were to conclude that the Secretary’s report to the President is a ‘final agency action’ within the meaning of 5 U.S.C. § 704, the Secretary’s decision to use home of record data to allocate overseas employees to the various States for apportionment purposes could not be reviewed under the APA, because it is ‘committed to agency discretion’ within the meaning of 5 U.S.C. § 701(a)(2).”).

106. *Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992).

107. *Id.*

108. See *infra* text accompanying note 280.

would have been a sounder rationale than the one the Court actually relied upon—that the President is not an “agency.”

Justice O’Connor may have thought that holding that the census was committed to the President’s discretion would have made it difficult to allow judicial review of Massachusetts’s constitutional claim. If so, she was mistaken. In the federal appellants’ reply brief, the SG argued that because the census is purely discretionary, there could be no judicial review of Massachusetts’ statutory or constitutional claims.<sup>109</sup> The SG distinguished *Webster v. Doe*,<sup>110</sup> where the Court held that a Central Intelligence Agency employee who was fired for being gay could not challenge his discretionary dismissal under the APA but could challenge it under the Constitution.<sup>111</sup> The instant case was different, the SG argued, because Massachusetts’ constitutional claim was identical to its statutory claim.<sup>112</sup>

In fact, Massachusetts’ constitutional claim differed from its statutory claim. Massachusetts argued that the apportionment decision was arbitrary under the APA because it was based on unreliable data; it violated the Constitution because even if the data was correct, apportionment must be based on “the current inhabitants of each State.”<sup>113</sup> Massachusetts did not have the opportunity to challenge the assertion in the SG’s reply brief that its claims were identical because its reply brief was due the same day as the SG’s reply brief.<sup>114</sup> Instead, Massachusetts simply asserted that “[t]here is no question that Massachusetts’ constitutional claims are judicially reviewable,” citing *Webster*.<sup>115</sup> The Massachusetts Assistant Attorney General did not take up the issue at the oral argument the next day either.<sup>116</sup>

Justice O’Connor appears to have tried to preserve some judicial review of the census while simultaneously protecting the President. Her opinion for the Court was an attempt to thread the needle by allowing constitutional claims but not APA claims against the President. The Court could have achieved that, however, even if it had held that the census was unreviewable under the APA because it was committed to the President’s discretion.

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109. Reply Brief for Appellants at 9–10, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

110. *Webster v. Doe*, 486 U.S. 592 (1988).

111. *Id.* at 601, 605.

112. Transcript of Oral Argument at 5–6, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502); *see also* Reply Brief for Appellants at 9, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

113. Brief of Appellees at 34–35, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

114. *See* Docket, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

115. Reply Brief of Appellees at 31, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).

116. Transcript of Oral Argument at 22–50, *Franklin v. Massachusetts*, 505 U.S. 788 (1992) (No. 91-1502).



Certainly, an action can be within the scope of statutory discretion but still violate the Constitution, as *Webster* itself demonstrates.<sup>117</sup>

#### E. *Dalton v. Specter*

Two years after *Franklin*, in *Dalton v. Specter*,<sup>118</sup> the Court held that judicial review was not available for a claim challenging the closure of the Philadelphia Naval Shipyard under the Defense Base Closure and Realignment Act of 1990.<sup>119</sup> As it had in *Franklin*, the Court in *Dalton* again failed to examine closely the question of whether the President is an “agency” under the APA, and it failed to take the more doctrinally sound approach of holding that the Court lacked jurisdiction because the President’s decision was committed to his discretion under § 701(a)(2).<sup>120</sup>

Following *Franklin*, the *Dalton* Court held that, under the APA, the Secretary of Defense’s report to the President was not final, and the President’s ultimate decision was not reviewable because the President is not an “agency.”<sup>121</sup> Again, only five justices joined this conclusion: Chief Justice Rehnquist, the author, with Justices O’Connor, Scalia, Kennedy, and Thomas.<sup>122</sup> The other four justices were of the opinion that the Act precluded judicial review entirely, and thus, it was not necessary to decide whether there was final agency action.<sup>123</sup>

The Court was unanimous, however, in holding that the President’s decision was not reviewable for constitutionality.<sup>124</sup> The Respondents had not raised a constitutional claim or named the President as a defendant.<sup>125</sup> Unlike in *Franklin*, the Respondents in *Dalton* alleged merely that “the President exceeded his statutory authority.”<sup>126</sup> Nonetheless, the court of appeals had “transmuted” the APA claim into a constitutional claim, reasoning that “whenever the President acts in excess of his statutory authority, he also violates the constitutional separation-of-powers doctrine.”<sup>127</sup> The Supreme Court rejected that analysis, pointing out that it distinguishes between claims that an officer has acted unconstitutionally and claims that an officer has acted outside the scope of statutory

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117. *Webster v. Doe*, 486 U.S. 592, 603 (1988), cited in *Franklin*, 505 U.S. at 801.

118. *Dalton v. Specter*, 511 U.S. 462 (1994).

119. *Id.* at 477.

120. *Id.* at 462.

121. *Id.* at 469–70.

122. *Id.* at 463.

123. *Id.* at 484 (Souter, J., concurring); see also 5 U.S.C. § 701(a)(1) (2018) (“This chapter applies . . . except to the extent that—statutes preclude judicial review.”).

124. 511 U.S. at 471–76.

125. *Id.* at 466, 471.

126. *Id.* at 474.

127. *Id.* at 471.

authority.<sup>128</sup> Thus, claims that the President has exceeded statutory authority, the Court held, “are not ‘constitutional’ claims, subject to judicial review under the exception recognized in *Franklin*.”<sup>129</sup> The claim in *Dalton* was simply a statutory claim.<sup>130</sup>

The Court went on to assume that statutory claims against the President “are judicially reviewable outside the framework of the APA.”<sup>131</sup> It cited in support of that assumption *Dames & Moore v. Regan*,<sup>132</sup> which is an example of nonstatutory review.<sup>133</sup> Nonstatutory review allows suits against officers of the United States for injunctive relief even without a statutory waiver of the government’s sovereign immunity.<sup>134</sup> It rests on the legal fiction that an officer who is acting unconstitutionally or ultra vires is not acting on behalf of the sovereign and thus is not protected by the sovereign’s immunity.<sup>135</sup> In *Dalton*, the Court held that nonstatutory review was not available because “the statute in question commits the decision to the discretion of the President.”<sup>136</sup> In so holding, the Court reflected a basic principle of nonstatutory review: it requires violation of a clear statutory mandate.<sup>137</sup>

#### F. Fallout

As a result of *Franklin* and *Dalton*, the President does not have to follow any of the APA’s procedural mandates. When an agency issues a binding rule, it must publish a notice of the proposed rule, accept and consider public comments, and publish a final rule with a “concise general statement” of the rule’s “basis and purpose.”<sup>138</sup> The President is not bound to those requirements and typically does not fulfill them.<sup>139</sup> In addition, following *Franklin* and *Dalton*, judicial review of presidential orders is available, but incomplete; the courts of appeals will not engage in APA-style arbitrary or capricious review.<sup>140</sup>

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128. *Id.* at 472.

129. *Id.* at 473–74.

130. *Id.* at 474.

131. *Id.* (citing *Dames & Moore v. Regan*, 453 U.S. 654, 667 (1981)).

132. *Dames & Moore*, 453 U.S. at 654.

133. See Siegel, *supra* note 43, at 1621, 1672 & n.265.

134. Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 DRAKE L. REV. 77, 78 (2005) [hereinafter Kovacs, *Revealing Redundancy*].

135. *Id.* at 89.

136. *Dalton*, 511 U.S. at 474.

137. Kovacs, *Revealing Redundancy*, *supra* note 134, at 108.

138. 5 U.S.C. § 553(b)–(c) (2018).

139. John M. Griesbach, *Some Observations About the Turn Toward Federal Rulemaking in Health Law*, 49 ST. LOUIS U. L.J. 141, 168 n.109 (2004); Stack, *Statutory President*, *supra* note 8, at 552, 554–55.

140. See 5 U.S.C. § 706(2)(A) (2018).

The D.C. Circuit explained in *Chamber of Commerce v. Reich*<sup>141</sup> that *Franklin* does not preclude statutory challenges to presidential decisions entirely.<sup>142</sup> There the court addressed a “challenge [to] President Clinton’s Executive Order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike.”<sup>143</sup> The court held that it would be able to review the President’s actions for compliance with relevant statutes using nonstatutory review.<sup>144</sup> Ultimately, the court held that the National Labor Relations Act (NLRA) preempted the executive order.<sup>145</sup>

Similarly, a year later, *Franklin* did not prevent the D.C. Circuit from reaching the merits of a case challenging the President’s removal of a member of the National Credit Union Administration (NCUA).<sup>146</sup> The APA’s waiver of sovereign immunity did not apply, the court held, because “the action that Swan complains of, his removal, was performed by the President, and the President is not an agency within the meaning of the APA.”<sup>147</sup> Nonstatutory review was available, however, to challenge the legality of Swan’s removal under the NCUA Act.<sup>148</sup> The court reviewed the statutory claim and rejected it.<sup>149</sup>

The D.C. Circuit also has said that presidential orders are reviewable for abuse of discretion,<sup>150</sup> which would seem to conflict with *Franklin*’s statement that “the President’s actions . . . are not reviewable for abuse of discretion under the APA.”<sup>151</sup> The D.C. Circuit appears, however, to limit that “abuse of discretion” review to determining whether the President has acted within the scope of the statutory delegation.<sup>152</sup> The court of appeals has not reviewed presidential actions under an arbitrary or capricious standard of review like that provided in the APA.<sup>153</sup>

In *Chamber of Commerce*, for example, the D.C. Circuit said that *Dalton*’s holding that presidential actions may not be reviewed for abuse of

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141. *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996).

142. *Id.* at 1329.

143. *Id.* at 1324.

144. *Id.* at 1330–31.

145. *Id.* at 1339.

146. *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996).

147. *Id.* at 981 n.4; *see also* *Alexander v. Trump*, 753 F. App’x 201, 206 (5th Cir. 2018) (unpublished) (holding APA’s waiver of sovereign immunity does not apply to the President); *Zaidan v. Trump*, 317 F. Supp. 3d 8, 21–22 (D.D.C. 2018) (same).

148. *Swan*, 100 F.3d at 981 (citing *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Dugan v. Rank*, 372 U.S. 609, 621–23 (1963)).

149. *Swan*, 100 F.3d at 988.

150. *See, e.g.*, *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002); *cf.* *Tulare Cty. v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2002).

151. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

152. *Mountain States*, 306 F.3d at 1136.

153. 5 U.S.C. § 706(2)(A) (2018).

discretion is limited to circumstances in which a statute assigns a specific decision to the President with no constraint on the President's decision.<sup>154</sup> The court of appeals in *Chamber of Commerce* held that *Dalton* was inapposite because the claim there was that the President's action violated the NLRA, which did not delegate authority to the President to issue the challenged order.<sup>155</sup> As mentioned above, the court held that the NLRA preempted the President's order.<sup>156</sup> Despite its statement about the court's authority to review presidential actions for abuse of discretion, it did not engage in APA-style review, but merely analyzed whether the President had acted within statutory bounds.

Similarly, *Franklin* also has not prevented the D.C. Circuit from reviewing the President's Antiquities Act proclamations for "abuse of discretion,"<sup>157</sup> but that review has been limited to ensuring that the proclamations "are consistent with constitutional principles and that the President has not exceeded his statutory authority."<sup>158</sup> The Antiquities Act authorizes the President to declare national monuments on public lands that contain "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" and requires that the monument "be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>159</sup> In *Mountain States Legal Foundation v. Bush*, the plaintiffs urged the court to subject the proclamations at issue to a "substantial evidence" standard<sup>160</sup> like that provided in the APA.<sup>161</sup> The court followed *Chamber of Commerce* and reiterated that presidential actions are reviewable where a "statute places discernible limits on the President's discretion," and that "[c]ourts remain obligated to determine whether statutory restrictions have been violated."<sup>162</sup> The court had no occasion to address *Mountain States'* request for "substantial evidence" review, however, because its complaint was devoid of factual allegations; it presented only legal conclusions.<sup>163</sup> Nonetheless, the court noted that the proclamations at issue made the requisite recitations

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154. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996).

155. *Id.* at 1332.

156. *Id.* at 1339.

157. See *Mountain States*, 306 F.3d at 1135–36 (D.C. Cir. 2002); *Tulare Cty. v. Bush*, 306 F.3d 1138 (D.C. Cir. 2002).

158. *Mountain States*, 306 F.3d at 1136.

159. 54 U.S.C. § 320301(a)–(b) (2018). The statute commonly referred to as "the Antiquities Act" was originally titled "An Act For the preservation of American antiquities." Pub. L. No. 209, 34 Stat. 225 (1906); see also *Alaska v. United States*, 545 U.S. 75, 101 (2005), *judgment entered*, 546 U.S. 413 (2006).

160. 306 F.3d at 1134.

161. 5 U.S.C. § 706(2)(E) (2018).

162. 306 F.3d at 1136.

163. *Id.* at 1137.

before affirming the dismissal of the complaint.<sup>164</sup> Thus, in the D.C. Circuit, *Franklin* and *Dalton* have not eliminated judicial review of presidential actions entirely but have constrained it considerably.

Unlike the D.C. Circuit, the Federal Circuit will not exercise judicial review to ensure that the President has acted within the scope of the statutory delegation.<sup>165</sup> In *Motions Systems Corp. v. Bush*,<sup>166</sup> the Federal Circuit sitting *en banc* addressed a challenge to the President's decision not to grant import relief for the domestic pedestal actuator industry under the U.S.-China Relations Act of 2000.<sup>167</sup> That statute empowers the President to deny relief if, following a recommendation from the U.S. Trade Representative, the President finds "that the taking of such action would have an adverse impact on the United States economy clearly greater than the benefits of such action."<sup>168</sup> The majority held that judicial review was unavailable to challenge either the Trade Representative's recommendation or the President's decision.<sup>169</sup> The court concluded that Motions Systems had presented "no colorable claim that the President exceeded his statutory authority."<sup>170</sup> Rather, Motions Systems alleged that the President's decision was "without evidentiary support"<sup>171</sup> and thus an abuse of discretion.<sup>172</sup> Following *Dalton*, the court determined that the statute gave the President broad, unreviewable discretion, and the Trade Representative's recommendations were not final.<sup>173</sup> Judge Gajarsa, joined by Judge Newman, wrote separately, opining that "it is the judiciary's role, and its duty, to review whether the President acted within the statutory parameters."<sup>174</sup> Motion Systems petitioned for certiorari, alleging that the Federal Circuit's decision conflicted with the D.C. Circuit's decisions in *Chamber of Commerce* and *Mountain States*,<sup>175</sup> but the Supreme Court denied the petition.<sup>176</sup>

Similarly, in *Michael Simon Design, Inc. v. United States*,<sup>177</sup> the Federal Circuit held that the President's proclamation modifying the Harmonized

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164. *Id.*; see also *Tulare Cty. v. Bush*, 306 F.3d 1138, 1140 (D.C. Cir. 2002) (affirming dismissal for failure to state a claim).

165. See Stack, *Reviewability*, *supra* note 43, at 1197.

166. *Motions Sys. Corp. v. Bush*, 437 F.3d 1356 (Fed. Cir. 2006) (*en banc*) (per curiam).

167. *Id.* at 1357.

168. *Id.* at 1359 (quoting 19 U.S.C. § 2451(k)(2) (2000)).

169. *Id.*

170. *Id.* at 1360; see also *id.* at 1361.

171. *Id.* at 1360.

172. *Id.* at 1361.

173. *Id.* at 1360, 1362.

174. *Id.* at 1362 (Gajarsa, J., concurring in part and concurring in the judgment).

175. Petition for Writ of Certiorari at 7–8, *Motion Sys. Corp. v. Bush*, 549 U.S. 814 (2006) (No. 05-1443).

176. See *Motion Sys. Corp. v. Bush*, 549 U.S. 814 (2006).

177. *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010).

Tariff Schedule was unreviewable.<sup>178</sup> The relevant statute requires the President to determine that the International Trade Commission's proposed modifications conform to U.S. treaty obligations and "do not run counter to the national economic interest of the United States."<sup>179</sup> The court held that the International Trade Commission's recommendation was not final,<sup>180</sup> and the plaintiff could not challenge the proclamation as beyond the President's statutory authority because the statute committed the decision to the President's discretion.<sup>181</sup>

The Supreme Court's rush to judgment in *Franklin* hatched a circuit split. The D.C. Circuit reviews presidential actions for adherence to statutory constraints; the Federal Circuit does not. Neither court reviews the President's actions under anything resembling an arbitrary or capricious standard. Had the *Franklin* Court taken the time to examine the issues fully, it would have realized that the President is an "agency" under the APA.

## II. FRANKLIN WAS WRONG

Assuming Justice Blackmun's file contains a complete record of the Court's deliberations in *Franklin*, it appears that the Court, in its haste, paid no attention to the text and history of the APA, which indicate that the President should be considered an "agency." Moreover, if the Court had considered the constitutional issues more closely, its concerns would have been allayed.<sup>182</sup>

### A. The Text

The text of the APA should have inspired deeper deliberation in the Supreme Court. The plain language of the APA includes the President.<sup>183</sup> Section 2(a) of the APA defines "agency" broadly as "each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts or the governments of the possessions, Territories, or the District of Columbia."<sup>184</sup>

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178. *Id.* at 1340.

179. *Id.* at 1342 (quoting 19 U.S.C. § 3006(a)(2) (2006)).

180. *Id.* at 1338.

181. *Id.* at 1340.

182. When I said that "the *Franklin* rule is permissible," Kathryn E. Kovacs, *Leveling the Deference Playing Field*, 90 OR. L. REV. 583, 617–18 (2011) [hereinafter Kovacs, *Leveling*], I was wrong. Like the Court, if I had examined the relevant materials more closely, I would have discovered my error.

183. See Siegel, *supra* note 43, at 1621 n.41 ("The Court's holding can be criticized as a matter of statutory interpretation."); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1107 (2009) ("This definition is sweeping, and its structure strongly implies that any federal governmental body not expressly excluded is covered.").

184. Administrative Procedure Act, Pub. L. No. 79-404, § 2(a) (1946).

The President is an “authority . . . of the Government of the United States,”<sup>185</sup> and is not expressly excluded from the definition, as are Congress and the federal courts.<sup>186</sup> The canon *expressio unius est exclusio alterius* applies when “a series of two or more terms or things . . . should be understood to go hand in hand.”<sup>187</sup> The President goes hand in hand with the other two branches of government, at least for these purposes.<sup>188</sup> “The President is certainly an ‘authority’ of government and is not specifically excluded, so based on the APA’s text alone, the President would appear to be subject to its provisions.”<sup>189</sup>

Moreover, Congress excluded some presidential functions from the definition of “agency.” Section 2(a) expressly exempted from the definition of “agency” “functions conferred by . . . the Selective Training and Service Act of 1940.”<sup>190</sup> The Selective Training and Service Act delegated authority to the President to induct men into the armed forces under rules prescribed by the President.<sup>191</sup> It also authorized the President to prescribe rules for deferment of service.<sup>192</sup> Impliedly, then, other presidential functions were subject to the APA, unless otherwise exempted. “One might well think that by a powerful negative implication the President must be covered.”<sup>193</sup>

Shortly after the Court decided *Franklin*, Bernard Schwartz argued that its approach conflicted with the typical “inclusive approach” to interpreting the term “agency” in the APA.<sup>194</sup> Congress’s intent, he argued, “was to subject all governmental acts to APA requirements” except those explicitly exempted.<sup>195</sup> *Franklin* thus permits the President “to violate the law where the violation does not raise any constitutional issue.”<sup>196</sup>

As I argued elsewhere, the courts should hesitate to disturb the legislative bargain embodied in the APA.<sup>197</sup> The APA represents an extraordinary moment of deliberative democracy. It followed years of debate among Congress, dozens of federal agencies in the Roosevelt administration, the

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185. *Id.*

186. 5 U.S.C. § 551(1) (2018).

187. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002)).

188. *See id.* (explaining that the *expressio unius* canon “has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence” (quoting *United States v. Vonn*, 535 U.S. 822, 836 (2001))).

189. *Stack, Reviewability*, *supra* note 43, at 1192.

190. Administrative Procedure Act, Pub. L. No. 79-404, § 2(a)(4) (1946).

191. *See* Selective Training and Service Act of 1940, Pub. L. No. 76-783, §§ 3(a), 4(a), 10(a)(1), 54 Stat. 885, 887, 893.

192. *Id.* § 5(c)(2), (c), 54 Stat. 888.

193. *Vermeule*, *supra* note 183, at 1108.

194. *Schwartz*, *supra* note 43, at 171.

195. *Id.*

196. *Id.*

197. *Kovacs, Superstatute Theory*, *supra* note 13, at 1250–54.

ABA, and other interested parties.<sup>198</sup> The Supreme Court participated in the deliberative conversation too, providing guidance as to what form of regulation would pass constitutional muster.<sup>199</sup> The text that arose from that exceptional legislative effort deserves respect.<sup>200</sup> Thus, in the very least, the APA's text should have given the *Franklin* Court pause.

I also have argued, however, that ongoing congressional deliberation can influence the meaning of the APA's original text.<sup>201</sup> Later Congresses arguably acted on the premise that the President is not an agency under the APA. In 1974, when Congress enacted the Freedom of Information Act (FOIA),<sup>202</sup> it borrowed the APA's definition of "agency," but "expanded" the definition "to include those entities which may not be considered agencies under section 551(1)."<sup>203</sup> In particular, Congress specified that it "includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."<sup>204</sup> Acting Assistant Attorney General Malcom D. Hawk objected that imposing FOIA on the President's staff would violate separation of powers and undermine the ability of the "President's most trusted advisors . . . to speak candidly on highly confidential matters."<sup>205</sup> In response, the Conference Report specified that "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President" are not agencies under FOIA.<sup>206</sup>

In 1976, in the Government in the Sunshine Act (Sunshine Act), Congress contrasted the President with agencies. The Sunshine Act borrowed FOIA's definition of "agency" but specified that the new provisions applied only to agencies "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate."<sup>207</sup>

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

199. Daniel B. Rodriguez & Barry R. Weingast, *Engineering the Modern Administrative State, Part I: Political Accommodation and Legal Strategy in the New Deal Era* 48–52 (Northwestern Public Law Research Paper No. 19-03, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3335114](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335114).

200. See Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L.J. 1155, 1190–91 (2016) [hereinafter Kovacs, *Scalia's Bargain*].

201. Kovacs, *Superstatute Theory*, *supra* note 13, at 1251–53.

202. Freedom of Information Act, Pub. L. No. 93-502, 88 Stat. 1561 (1974).

203. H.R. REP. NO. 93-876, at 128 (1974); *see also id.* at 131.

204. 5 U.S.C. § 552(f)(1) (2018).

205. H.R. REP. NO. 93-876, at 140.

206. H.R. CONF. REP. NO. 93-1380, at 15 (1974); *see also* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980).

207. Government in the Sunshine Act, Pub. L. No. 94-409, § 3(a), 90 Stat. 1241 (1976).



Congress's treatment of the President in FOIA does not necessarily negate coverage under the rest of the APA.<sup>208</sup> Nor does the decision to apply the Sunshine Act only to bodies with a majority of presidential appointees. If one considers post-enactment legislative treatment relevant to statutory interpretation, however, those decisions weaken the textual argument that the President is an "agency" under the APA.

### B. *The History*

To understand the APA's text, we also must examine the statutory history and full context.<sup>209</sup> Although there is not much material in the historic record about the President, the history shows that Congress intended to define "agency" broadly. This history should have raised an eyebrow and inspired the *Franklin* Court to examine the question of whether the President is an "agency" more closely.

A major administrative-reform bill that passed both houses of Congress before the APA expressly exempted the President. Congress began exploring administrative reform in earnest in 1939.<sup>210</sup> That year, Senator Logan and Representative Cellar introduced a bill drafted by the American Bar Association's Special Committee on Administrative Law.<sup>211</sup> When Congressman Walter reintroduced the bill a few months later, it came to be known as the Walter-Logan bill.<sup>212</sup> The bill would have required agencies to issue rules within one year of the enactment of any new statute.<sup>213</sup> Rules would by definition be issued by "officers in the executive branch,"<sup>214</sup> and the term "administrative officers" included "officers and employees in the executive branch, except the President of the United States."<sup>215</sup> The Walter-Logan bill passed both houses of Congress in 1940, but President Roosevelt vetoed it in part because he first wanted to see the report of the committee

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208. See 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 1.2, at 8 (2d ed. 1978) ("Does the new definition subtract from what was an 'agency' under the old definition? The quick answer is that it does not, because the operative word is 'includes,' which cannot be interpreted to exclude any item.").

209. Kovacs, *Superstatute Theory*, *supra* note 13, at 1250; Kathryn E. Kovacs, *Progressive Textualism in Administrative Law*, 118 MICH. L. REV. ONLINE 134, 140–44 (2019) [hereinafter Kovacs, *Progressive Textualism*]; Kathryn E. Kovacs, *Pixelating Administrative Common Law in Perez v. Mortgage Bankers Association*, 125 YALE L.J.F. 31, 34–35 (2015) [hereinafter Kovacs, *Pixelating*].

210. Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 685 (2010) [hereinafter Kovacs, *History*].

211. *Id.* at 682, 685.

212. *Id.* at 685.

213. See H.R. 6324, 76th Cong. § 2(b) (1939); see also Kovacs, *Rules About Rulemaking*, *supra* note 24, at 521–22.

214. H.R. 6324, § 1(1).

215. *Id.* § 1(2).

he had asked the Attorney General to form to study administrative reform.<sup>216</sup> (I will return to the Attorney General's Committee later.<sup>217</sup>)

Congress broadened the definition of "agency" in the bill that became the APA to encompass "those who have the real power to act."<sup>218</sup> The initial versions of the bill defined agency as "each office, board, commission, independent establishment, authority, corporation, department, bureau, division, institution, service, administration, or other unit of the Federal Government other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."<sup>219</sup> Congress later pared down the definition to "each authority . . . of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia."<sup>220</sup>

The House report on the bill explained that "agency" "is defined by excluding legislative, judicial, and territorial authorities and by including any other 'authority' whether or not within or subject to review by another agency."<sup>221</sup> It continued:

*Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words, agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of authority, it might result in the unintended inclusion of mere "housekeeping" functions or the exclusion of those who have the real power to act.*<sup>222</sup>

The new definition, as explained by the House report, is plainly broad enough to cover the President.

The Senate Judiciary Committee Print of June 1945 explained that "agency" "is defined substantially as in the Federal Reports Act of 1942 . . . the Federal Register Act [of 1935] . . . and the Federal Register Regulations."<sup>223</sup> The definition of "agency" in the Federal Register Act expressly included "the President of the United States,"<sup>224</sup> as did the Federal

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216. See Kovacs, *History*, *supra* note 210, at 689–90; Kovacs, *Rules About Rulemaking*, *supra* note 24, at 525.

217. See *infra* text accompanying notes 314–322.

218. H.R. REP. NO. 79-1980, *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. NO. 79-248, at 253 (1946) [hereinafter LEGISLATIVE HISTORY].

219. S. 2030, 78th Cong. § 1 (1944); *accord* H.R. 5081, 78th Cong. § 1 (1944).

220. S. 7, 79th Cong. § 2(a) (1945); *accord* H.R. 1203, 79th Cong. § 2(a) (1945).

221. H.R. REP. NO. 79-1980, *reprinted in* LEGISLATIVE HISTORY, *supra* note 218, at 252.

222. *Id.* at 253 (emphasis added).

223. STAFF OF S. COMM. ON THE JUDICIARY, 79TH CONG., REP. ON THE ADMINISTRATIVE PROCEDURE ACT (Comm. Print 1945), *reprinted in* LEGISLATIVE HISTORY, *supra* note 218, at 12 (citations omitted).

224. Federal Register Act of 1935, Pub. L. No. 74-220 § 4, 49 Stat. 500, 501.

Register regulations.<sup>225</sup> Seven years later, in the Federal Reports Act, Congress defined “agency” broadly enough to encompass the President; it included “any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government.”<sup>226</sup> While it did not expressly include the President, it did not expressly exclude the President either, as it did the General Accounting Office and the governments of the District of Columbia and U.S. territories.<sup>227</sup>

The only discussion in the statutory history that is directly on point came during a House Judiciary Committee hearing in June 1945. Interstate Commerce Commissioner Clyde B. Aitchison said that he would prefer a “more precise” definition of “agency” than the one in the bill that became the APA.<sup>228</sup> To demonstrate its inaccuracy, he asked whether the President is an agency.<sup>229</sup> Representative John Jennings, Jr., a Republican lawyer from Tennessee, answered: “Well, if it operates to forbid the President from operating as a legislative agency, I would say it is good law.”<sup>230</sup>

Following the APA’s enactment, the Attorney General issued a monograph interpreting the new Act. The Attorney General’s Manual on the Administrative Procedure Act seems to assume that all executive branch entities are “agencies.”<sup>231</sup> It states that the APA “applies to every authority of the Government of the United States other than Congress, the courts, the governments of the possessions, Territories, and the District of Columbia.”<sup>232</sup> Moreover, when discussing the exemption from judicial review for actions that are “committed to agency discretion,”<sup>233</sup> the Manual gives as an example “of such unreviewable agency action” the Tariff Act, which delegates authority to the President, thus implying that the President is an agency.<sup>234</sup>

In sum, there is ample historic support for reading the definition of “agency” according to its plain language as including the President.

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225. 1 C.F.R. § 2.1(c)(1) (1946 supp.) (defining “agency” to include the President).

226. Federal Reports Act of 1942, Pub. L. No. 77-831 § 7(a), 56 Stat. 1078, 1079–80.

227. *Id.*

228. *Administrative Procedure: Hearings on H.R. 184, H.R. 339, H.R. 1117, H.R. 1203, H.R. 1206, and H.R. 2602 Before the H. Comm. on the Judiciary, 79th Cong. (1945)* (statement of Clyde B. Aitchison, Commissioner, Interstate Commerce Commission), reprinted in LEGISLATIVE HISTORY, *supra* note 218, at 123.

229. *Id.*

230. *Id.*

231. TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 10 (1947).

232. *Id.*

233. *Id.* at 94 (quoting Administrative Procedure Act, Pub. L. No. 79-404, § 10(2), 60 Stat. 237, 243 (1946)).

234. *Id.*

### C. *Constitutional Concerns*

The Court in *Franklin* rushed to judgment. In its haste, the court allowed constitutional avoidance to run amok. Rather than examine the APA closely, which might have required resolving separation of powers issues, the Court punted; it required an express statement from Congress to subject the President to judicial review under the APA.<sup>235</sup> Yet, the Court preserved judicial review of constitutional claims.<sup>236</sup> Ironically, then, *Franklin* is an exemplar of constitutional avoidance that requires courts to deny review of statutory claims but address constitutional claims against the President.

If the Court had taken the time to examine the issues in *Franklin* more closely, it might have realized that exempting the President from the definition of “agency” raises its own constitutional concerns. It also might have realized that its unexamined concerns about “separation of powers and the unique constitutional position of the President”<sup>237</sup> were overblown. I argued previously that the military should be subject to the APA to same extent as any other agency because the Act’s plain language subjects all agencies to the same standard of review and its exemptions accommodate the separation of powers concerns with arbitrary or capricious review of military decisions.<sup>238</sup> The same is true of the President. The APA’s plain language covers the President, and its exemptions protect core presidential functions sufficiently to make *Franklin*’s wholesale exemption of the President unnecessary. A President who acts pursuant to a congressional delegation of authority—the Statutory President<sup>239</sup>—should be treated the same as any other statutory delegate.

#### 1. *Constitutional Balance*

Exempting the Statutory President from the definition of “agency” under the APA raises constitutional concerns. In the New Deal era, the conditions for the modern administrative state were set.<sup>240</sup> Congress engineered new administrative mechanisms to tackle the nation’s problems.<sup>241</sup> The Supreme Court responded and instructed Congress on how to write statutes in a way that would pass judicial muster.<sup>242</sup> Ultimately, Congress got the message, and the Supreme Court accepted these new bureaucratic institutions, but

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235. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

236. *Id.* at 801.

237. *Id.* at 800.

238. Kovacs, *Leveling*, *supra* note 182, at 586.

239. Stack, *Statutory President*, *supra* note 8, at 542.

240. Rodriguez & Weingast, *supra* note 199, at 4, 6.

241. *Id.* at 13.

242. *Id.* at 39–40.

only on certain conditions: the governing statutes would have to provide “suitable procedural safeguards” and sufficient detail to guide agency discretion,<sup>243</sup> and the judiciary would have to retain a “supervisory role.”<sup>244</sup> Thus, both administrative procedure and judicial review are “essential part[s] of the *quid pro quo* for the Court’s constitutional imprimatur on agency power.”<sup>245</sup>

The basic contours of the Court’s conditions were already baked into the new regulatory statutes that preceded the APA.<sup>246</sup> The debate about administrative power continued, however, among liberals and conservatives in Congress, the President, federal agencies, the ABA, and many other interested parties.<sup>247</sup> The APA represents a constitutional moment following years of meaningful democratic deliberation. At that moment, Congress and the President unanimously accepted the existence of the administrative state and congressional delegations of policymaking authority to executive branch agencies conditioned on procedural constraints and judicial review.<sup>248</sup>

The Statutory President, however, is not subject to such control, thanks to *Franklin*. Re-establishing the APA’s balance is critical to maintaining our democracy.<sup>249</sup> Indeed, the desire to avoid authoritarianism was one of the motivations for the APA. In the 1930s, Americans learned “the true dimensions of European totalitarianism,” and even New Deal supporters feared that President Roosevelt might go down that road.<sup>250</sup> The concern that administrative power could foment authoritarianism permeated the discourse about administrative reform.<sup>251</sup> “Congress designed the APA to avoid the danger that agencies would become tools of a dictatorial

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243. *Id.* at 40.

244. *Id.* at 44.

245. *Id.* at 42; see also Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 487 (1989); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 755 (1992).

246. Rodriguez & Weingast, *supra* note 199, at 52.

247. See generally Shepherd, *supra* note 198.

248. Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 380–81 (2009); Rodriguez & Weingast, *supra* note 199, at 7, 10; see also Kovacs, *Superstatute Theory*, *supra* note 13, at 1227 (noting that the APA passed both Houses of Congress unanimously); *supra* text accompanying notes 197–200.

249. See Harris, *supra* note 248, at 352 (painting the APA as “the modern embodiment of the quintessential American system of checks and balances among the three branches of government”).

250. Reuel E. Schiller, *Reining in the Administrative State: World War II and the Decline of Expert Administration*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 185, 188–89 (Daniel R. Ernst & Victor Jew eds., 2002); see also Reuel E. Schiller, *Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment*, 86 VA. L. REV. 1, 77, 85–86 (2000) [hereinafter Schiller, *Free Speech*].

251. See Kovacs, *Rules About Rulemaking*, *supra* note 24, at 521, 525, 527–28; Kovacs, *History*, *supra* note 210, at 695.

president.”<sup>252</sup> When the President assumes policymaking power without policymaking constraints, it undermines the central bargain of the APA and shakes the foundation upon which the administrative state is built.

Gillian Metzger argued that “the reality of delegation” has made the administrative state “constitutionally obligatory.”<sup>253</sup> Federal agencies combine expert, professional, civil-service personnel with multiple oversight and accountability mechanisms, public participation, and procedural requirements.<sup>254</sup> That complexity makes them “the key to an accountable, constrained, and effective executive branch.”<sup>255</sup> Thus, she argues that bureaucracy is essential for constraining presidential power.<sup>256</sup> Those bureaucratic constraints must reach the presidency itself when the President exercises statutorily delegated power. The Supreme Court in *Franklin* failed to take such concerns into consideration.

## 2. APA Exceptions

The Court in *Franklin* also failed to consider that the APA would not apply to the President’s core constitutional functions.<sup>257</sup> The APA protects the President when acting as Commander in Chief in 5 U.S.C. § 551(1)(G), which exempts from the definition of “agency” “military authority exercised in the field in time of war or in occupied territory.”<sup>258</sup> As I explained elsewhere, the Commander in Chief power bears a nexus to combat.<sup>259</sup> The “military authority” exemption bears a similar nexus to combat. It reaches any site of military operations, including areas in which U.S. forces are engaged in combat as well as domestic training locations with some connection to combat.<sup>260</sup> Congress need not issue a declaration of war for combat to qualify as “time of war” under the APA exemption.<sup>261</sup> Moreover, the exemption should be read broadly both because it is an exception to a waiver of federal sovereign immunity and because a broad interpretation avoids separation of powers concerns about intruding on the

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252. Kathryn E. Kovacs, *Fomenting Authoritarianism Through Rules About Rulemaking*, in *THE FRONTIERS OF PUBLIC LAW* 429, 440 (Jason NE Varuhas & Shona Wilson Stark, eds., 2020); *see also id.* at 434–35 (describing the deliberation of the APA).

253. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 *HARV. L. REV.* 1, 87 (2017).

254. *Id.* at 71–72, 78–87.

255. *Id.* at 72; *see also id.* at 78.

256. *Id.* at 7, 51, 87.

257. *See Vermeule, supra* note 183, at 1107.

258. 5 U.S.C. § 551(1)(G) (2018); *see also* 5 U.S.C. § 701(b)(1)(G) (2018) (incorporating identical definition into APA’s judicial review provisions).

259. Kovacs, *Leveling, supra* note 182, at 619.

260. Kovacs, *History, supra* note 210, at 677–78, 712–17.

261. *Id.* at 717.

President's power as Commander in Chief.<sup>262</sup> In addition, section 553 exempts any "military . . . function" from the APA's rulemaking provisions.<sup>263</sup> Thus, whenever the President acts as Commander in Chief, he would be exempt from the entire APA, including its rulemaking and judicial review provisions.

Presidential actions under the Treaty Clause<sup>264</sup> would be insulated from the APA's rulemaking functions under the exemption for "foreign affairs function[s]."<sup>265</sup> Any presidential rule regarding an international agreement, international affairs, or tariffs would likely be exempted.<sup>266</sup>

Classified information is protected as well. The public information requirements of section 552 do not apply to "matters that are—(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order."<sup>267</sup> Courts review the government's invocations of this exemption deferentially.<sup>268</sup>

The exemptions in section 553's rulemaking provisions might encompass many other presidential statements. Any statement that lacks the force of law constitutes a guidance document that need not go through rulemaking pursuant to the exemption for "interpretative rules [and] general statements of policy."<sup>269</sup> The APA's notice-and-comment rulemaking procedures do not apply to matters relating to agency management or personnel; public property, loans, grants, benefits, or contracts; or rules of agency organization, procedure, or practice.<sup>270</sup> Many agencies voluntarily waive this exemption,<sup>271</sup> but the President could take full advantage of it. Section 553 also exempts agencies from notice and comment "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."<sup>272</sup> Although this exemption is construed narrowly,<sup>273</sup> it could insulate presidential actions that concern public health and safety, are short

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262. Kovacs, *Leveling*, *supra* note 182, at 619–20; Kovacs, *History*, *supra* note 210, at 720.

263. 5 U.S.C. § 553(a)(1) (2018).

264. U.S. CONST. art. II, § 2, cl. 2.

265. 5 U.S.C. § 553(a)(1).

266. See JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 68 (6th ed., 2018); Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 913–14 (2014).

267. 5 U.S.C. § 552(b)(1) (2018).

268. See Margaret B. Kwoka, *Deferring to Secrecy*, 54 B.C. L. REV. 185, 214 (2013).

269. 5 U.S.C. § 553(b)(3)(A); see also LUBBERS, *supra* note 266, at 74–103.

270. 5 U.S.C. § 553(a), (b)(3)(A). See generally LUBBERS, *supra* note 266, at 61–74.

271. LUBBERS, *supra* note 266, at 63–64 (citing regulations).

272. 5 U.S.C. § 553(b)(3)(B); see also LUBBERS, *supra* note 266, at 105–24.

273. LUBBERS, *supra* note 266, at 105.

lived and followed promptly by agency notice-and-comment rulemaking, or are non-controversial,<sup>274</sup> among others.

Judicial review is not available to challenge agency action where the matter is “committed to agency discretion by law” or “statutes preclude judicial review.”<sup>275</sup> That exemption applies equally to the President. According to the Attorney General’s Manual on the Administrative Procedure Act, the exemption for matters “committed to agency discretion” covers presidential actions under the Tariff Act, which delegates decisions to the President’s judgment.<sup>276</sup> “After 9/11, lower courts have sometimes applied the ‘committed to agency discretion’ exception quite capaciously in national security contexts.”<sup>277</sup> Thus, this exemption would insulate core presidential functions from judicial review under the APA.

Indeed, the presidential decisions in *Franklin* and *Dalton* might have been exempt from judicial review under this provision. *Franklin* concerned the President’s report to Congress of the States’ population according to the census and the apportionment of Representatives.<sup>278</sup> The *Franklin* majority held that the statute requiring that report imposed no constraint on the President’s report.<sup>279</sup> Thus, the Court in *Franklin* could have premised its judgment on the ground that the final decision was committed to the President’s discretion.<sup>280</sup> *Dalton* concerned the Defense Base Closures and Realignment Act of 1990, which required the President to approve or disapprove of the Commission’s recommendations.<sup>281</sup> Again, the Court held that “the Act . . . does not by its terms circumscribe the President’s discretion.”<sup>282</sup> The *Dalton* Court followed *Franklin* in holding that the President’s decision was not reviewable under the APA.<sup>283</sup> It went on to hold that his decision was not otherwise reviewable because it was committed to his discretion.<sup>284</sup>

Therefore, the APA itself would protect core presidential functions from the APA’s rulemaking and judicial review provisions. Had the *Franklin* Court recognized this, it may not have written a presidential exemption into the APA.

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274. *Id.* at 109–10, 114–116.

275. 5 U.S.C. § 701(a) (2018).

276. CLARK, *supra* note 231, at 94. As noted above, this implies that the President is an agency. See *supra* text accompanying note 234.

277. Vermeule, *supra* note 183, at 1114.

278. *Franklin v. Massachusetts*, 505 U.S. 788 (1992); see 2 U.S.C. § 2a(a) (2018).

279. 505 U.S. at 797–99.

280. See *supra* text accompanying notes 101–117.

281. *Dalton v. Specter*, 511 U.S. 462 (1994); Defense Base Closures and Realignment Act of 1990, Pub. L. No. 101-510, § 2903(e), 104 Stat. 1808, 1812 (codified as amended at note following 10 U.S.C. § 2687 (Supp. IV 1998)).

282. 511 U.S. at 470.

283. *Id.* at 476.

284. *Id.* at 477.



### 3. *Privileges*

The presidential communications privilege should have further alleviated the Supreme Court's concerns about applying the APA to the President. The privilege applies when the President is the decisionmaker.<sup>285</sup> It is designed to free the President "and those who assist him . . . to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."<sup>286</sup> The presidential communications privilege, however, is not absolute.<sup>287</sup> Rather, the courts must balance the President's need for confidential conversations against other values and "in light of our historic commitment to the rule of law."<sup>288</sup> By the same token, Congress may determine that other values outweigh the privilege in the domestic policy arena.<sup>289</sup>

Even where the presidential communications privilege does not apply, the deliberative process privilege protects federal officers from disclosing certain information. Judicial review of final agency action is limited to the administrative record, that is, anything the decisionmaker considered in reaching a final decision.<sup>290</sup> Documents that reflect pre-decisional deliberation may be protected under the deliberative process privilege,<sup>291</sup> which is incorporated into FOIA's exemption 5.<sup>292</sup> These materials constitute part of the give and take in the agency before the final decision and reflect the opinion of the writer, not the decisionmaker, on matters of law or policy.<sup>293</sup> In other words, the privilege protects material that was produced as part of the decisionmaking process but was not incorporated into the final decision.<sup>294</sup> It aims to encourage frank discussion and avoid misleading the public about the rationale for the agency's final decision.<sup>295</sup>

Michael Ray Harris argued that the deliberative process privilege should not apply in APA cases because it undermines judicial review of the "whole

285. Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 486, 488 (1987).

286. *United States v. Nixon*, 418 U.S. 683, 708 (1974); *see also* *Judicial Watch, Inc. v. Dep't of Justice*, 365 F.3d 1108, 1115 (D.C. Cir. 2004). *See generally* Brief for Legal Scholars as Amicus Curiae in Opposition to Petition for Writ of Mandamus at 13–17, *In re United States*, 138 S. Ct. 443 (2017) (No. 17-801).

287. *Nixon*, 418 U.S. at 703, 706.

288. *Id.* at 706–08.

289. McGarity, *supra* note 285, at 486.

290. *See* *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564, 2574 (2019); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); *Aram A. Gavoor & Steven A. Platt, Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 26–29 (2018).

291. Gavoor & Platt, *supra* note 290, at 35–36.

292. 5 U.S.C. § 552(b)(5) (2018) (exempting "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency").

293. *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

294. *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001).

295. Harris, *supra* note 248, at 354.

record” and “hard look” review.<sup>296</sup> He explained that President Eisenhower first invoked it to avoid providing sensitive military information to Senator McCarthy.<sup>297</sup> It made its first appearance in a U.S. court in 1958,<sup>298</sup> then “spread like ‘wildfire.’”<sup>299</sup> Harris argued that the privilege undermines transparency and enables agencies to hide evidence that they acted for reasons outside their authority.<sup>300</sup> He further argued that the privilege undermines the balance struck in the APA between legislative and executive power<sup>301</sup> by allowing the executive branch to “frustrate judicial review” and “cover up decisions that are being made largely on political grounds.”<sup>302</sup>

Courts are split on whether deliberative process materials must be included in administrative records in APA cases.<sup>303</sup> The APA of 1946, however, did not require agencies to develop a rulemaking record at all,<sup>304</sup> much less one that includes privileged documents. I explained elsewhere how requiring agencies to produce administrative records in informal rulemaking contradicts the text and history of the APA.<sup>305</sup> In addition, given that “FOIA may provide for greater public access to agency records than the records an agency properly designates as the administrative record,”<sup>306</sup> it seems awkward to require agencies to include documents that do not need to be released under FOIA in their administrative records.<sup>307</sup> For purposes of this discussion, it suffices to say that, under current law, even if the presidential communications privilege were not applicable, the deliberative process privilege would protect a President to the same extent as any other officer.

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If the Court had examined the text, history, and constitutional issues more closely, it would have realized that, in the very least, the question of

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296. *Id.* at 387, 408–09; *see also* Brief for Legal Scholars as Amici Curiae in Opposition to Petition for Writ of Mandamus at 11–12, *In re* United States, 138 S. Ct. 443 (2017) (No. 17-801).

297. Harris, *supra* note 248, at 360–61.

298. *Id.* at 351, 362 (citing *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958)).

299. *Id.* at 363 (quoting Kirk D. Jensen, Note, *The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information Under the Federal Deliberative Process Privilege*, 49 DUKE L.J. 561, 567 (1999)).

300. *Id.* at 353.

301. *Id.* at 369.

302. *Id.* at 386.

303. Gavoor & Platt, *supra* note 290, at 37 (citing cases).

304. *See* LUBBERS, *supra* note 266, at 325–26; Harris, *supra* note 248, at 391–92.

305. *See* Kovacs, *Rules About Rulemaking*, *supra* note 24, at 535–38.

306. *Cty. of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 75 (D.D.C. 2008).

307. *But see* Harris, *supra* note 248, at 400 n.301 (presuming that the interest in disclosure is stronger in the context of judicial review of agency decisions than in the context of FOIA).

whether the President is an “agency” under the APA is a close one. Accordingly, the Supreme Court should have made a deliberation-inducing decision to bounce the ball into Congress’s court on this issue by holding that the President is an agency. William Eskridge and John Ferejohn argued that “important shifts of a constitutional magnitude ought not to be made without deliberation that is open and public; reasoned and factual; and legitimate.”<sup>308</sup> Thus, when the President is “skirting the constitutional edge” or undermining fundamental norms, Eskridge and Ferejohn suggested that judicial review should invite further public deliberation “by effectively remanding cases to the political branches.”<sup>309</sup>

On a practical level, holding in favor of the President in *Franklin* and *Dalton* denied Congress the opportunity to weigh in on the extent to which presidential policymaking should be procedurally or judicially constrained.<sup>310</sup> As Kevin Stack explained, “when the Court sustains a sitting President’s claim of statutory powers, . . . it effectively requires a congressional supermajority to overturn. In contrast, when the Court invalidates the President’s assertion of statutory powers, Congress does not face a supermajoritarian obstacle to overriding the Court’s determination.”<sup>311</sup> By exempting the President from the APA, the Supreme Court effectively robbed Congress of the chance to legislate on this issue.

#### D. *Changed Circumstances*

Circumstances have changed since Congress enacted the APA in 1946 and even since the Supreme Court decided *Franklin v. Massachusetts* in 1992. Now Presidents use exclusively statutory powers to take actions that have enormous impacts on the public.<sup>312</sup> Yet, the Statutory President bypasses the procedural constraints and judicial oversight that counterbalance statutory delegations to agencies. The need to overturn *Franklin* has taken on increased urgency.<sup>313</sup>

When Congress debated and passed the APA, it did not anticipate that presidential rulemaking would grow to the extent that it has. The Attorney General’s Committee on Administrative Procedure submitted its report on January 22, 1941, about a month after Congress failed to override President

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308. WILLIAM N. ESKRIDGE, JR. & JOHN FEREOH, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 289 (2010).

309. Kovacs, *Superstatute Theory*, *supra* note 13, at 1249 (citing ESKRIDGE & FEREOH, *supra* note 308, at 289, 436, 464).

310. See Stack, *Statutory President*, *supra* note 8, at 577.

311. Stack, *Reviewability*, *supra* note 43, at 1211.

312. See *supra* text accompanying notes 23–42.

313. See Morrison, *supra* note 44, at 17–18.

Roosevelt's veto of the Walter-Logan Bill.<sup>314</sup> As noted above, the SG argued in *Franklin* that the AG's Committee Report distinguished the President from agencies.<sup>315</sup> While true, that assertion was incomplete. The Committee appears not to have contemplated that the President might act like an agency outside the context of emergencies.

The AG's Committee report explained that Congress sometimes gives the President extraordinary rulemaking authority "to deal with emergency situations and often the determination of high matters of State."<sup>316</sup> The character of such situations, the Committee opined, makes normal agency rulemaking procedures "inapplicable."<sup>317</sup> When some powers that Congress initially authorized for "exceptional situations" were later "authorized for more frequent routine use," those changes were accompanied by a change in procedure.<sup>318</sup> The "exceptional" powers that were not assigned to agencies, the Committee continued, "remain extraordinary and will not be further considered here."<sup>319</sup>

The AG's Committee report included proposed bills from the liberal majority and the conservative minority.<sup>320</sup> Neither of the recommended bills would have covered the President—at least, it would have been awkward to read them as covering the President. The majority bill would have defined "agency" with reference to "any department, board, commission, authority, corporation, administration, independent establishment, or other subdivision of the executive branch."<sup>321</sup> The minority bill would have defined "agency" similarly: "each office, board, commission, independent establishment, authority, corporation, department, bureau, division, or other subdivision or unit of the executive branch."<sup>322</sup> The President is an "authority" of the government but is not a "subdivision" of the executive branch. Thus, it appears that no one on the Committee expected the President to issue rules outside the context of emergencies.

Now Presidents do so regularly.<sup>323</sup> Lisa Manheim and Kathryn Watts observed that there has been "a massive transfer of policymaking authority from the legislative branch to the executive branch, coupled with increasingly aggressive attempts by presidents to control that

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314. COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8 (1941); Kovacs, *History*, *supra* note 210, at 690.

315. *See supra* text accompanying note 80.

316. S. DOC. NO. 77-8, at 100.

317. *Id.* at 101.

318. *Id.*

319. *Id.*

320. *Id.* at 191, 217.

321. *Id.* at 192–93.

322. *Id.* at 217.

323. *See supra* text accompanying notes 24–42.

policymaking.”<sup>324</sup> Now “separation-of-powers principles cut not only in the direction of *protecting* the president,” but also “in the direction of . . . ensur[ing] that [the president] remains within legal limits.”<sup>325</sup> This shift in the balance of powers demands a new look at the President’s status under the APA.

To summarize, the Supreme Court in *Franklin* erred in holding that the President is not an “agency” under the APA. Its hasty decision conflicted with the plain language and history of the statute, both of which indicate that Congress intentionally defined “agency” broadly—broadly enough to encompass the Statutory President. Moreover, had the Court taken the time to consider the constitutional issues, it would have concluded that exempting the Statutory President from the definition of “agency” dangerously upsets our constitutional balance. It also would have realized that its separation of powers concerns were exaggerated. In short, *Franklin* was wrong, and the time has come to reverse it.

### III. *FRANKLIN* SHOULD BE OVERTURNED

Strong normative arguments support overruling *Franklin* and treating the Statutory President like an “agency.” The values underlying the APA’s procedural requirements include public participation, political accountability, transparency, deliberation, and uniformity.<sup>326</sup> To advance those values, the President, when acting pursuant to statutorily delegated power, should be held to the APA’s procedural requirements. The Statutory President also should be held accountable in court on the same terms as any other statutory delegate; judicial review further advances the APA’s values and helps to counterbalance congressional delegations of authority.<sup>327</sup>

#### A. Procedure

Like any other “agency,” the Statutory President’s binding statements should be subject to the rulemaking provisions in section 553 of the APA. Stack argued that the President’s statutory actions should receive *Chevron*

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324. Manheim & Watts, *supra* note 43, at 1810.

325. *Id.*

326. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 697 (2000); Kimberly N. Brown, *Public Laws and Private Lawmakers*, 93 WASH. U. L. REV. 615, 636 (2016); Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 123 (2011); Knowles, *supra* note 266, at 929; Gillian E. Metzger, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1309 (2012).

327. Judicial review is not always available to challenge agency action. See, e.g., Kovacs, *Scalia’s Bargain*, *supra* note 200, at 1182 (arguing that the APA’s waiver of sovereign immunity applies only to APA claims and is subject to the other limitations in the APA); Thomas W. Merrill, *Delegation and Judicial Review*, 33 HARV. J.L. & PUB. POL’Y 73, 80 (2010) (“Congress is not required to provide for judicial review of executive action.”).

deference.<sup>328</sup> In the course of that argument, he implied that it is unnecessary to impose additional procedure in the context of statutory delegations of authority to the President<sup>329</sup> because “the president’s political accountability, visibility, ability to coordinate policy, and the transparency of presidential orders” are as effective as “formal procedural constraints.”<sup>330</sup> I disagree. Recent Presidents have abused their statutory authorities. Applying APA procedures to the Statutory President could go a long way towards avoiding authoritarianism.<sup>331</sup>

### *1. Public Participation*

Among the APA’s core values is public participation.<sup>332</sup> The Attorney General’s Committee on Administrative Procedure believed that allowing the public to participate in agency rulemaking would improve the quality of agency decisions and protect private interests.<sup>333</sup> The Committee explained that, unlike a legislature, agencies are not representative bodies; they are experts in a given field.<sup>334</sup> However, their “knowledge is rarely complete.”<sup>335</sup> Their decisionmaking procedures, therefore, “should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses” to ensure that agency decisions are “fair and intelligent.”<sup>336</sup> The Senate Judiciary Committee echoed the Attorney General’s Committee Report, stating that [p]ublic participation “in the rulemaking process is essential in order to permit administrative agencies to inform themselves and to afford safeguards to private interests.”<sup>337</sup> Congress pursued the value of public participation in the APA itself by

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328. Stack, *Statutory President*, *supra* note 8, at 585.

329. *Id.*; *see also* Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 308–09 (2006).

330. Stack, *Statutory President*, *supra* note 8, at 591–92.

331. Presidential adjudication seems to be a rarity. *But see* Catherine Y. Kim, *The President’s Immigration Courts*, 68 EMORY L.J. 1 (2018) (evaluating presidential control over immigration adjudication). Thus, I do not discuss it here beyond observing that failure to adhere to the APA’s adjudication requirements would raise a host of concerns, including potentially procedural due process concerns. *See* William Funk, *The Rise and Purported Demise of Wong Yang Sung*, 58 ADMIN. L. REV. 881, 884–85 (2006).

332. *See* Iowa League of Cities v. E.P.A., 711 F.3d 844, 873 (8th Cir. 2013); Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 ADMIN. L. REV. 807, 858 (2018).

333. COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 103 (1941).

334. *Id.* at 101–02.

335. *Id.* at 102.

336. *Id.*; *see also* Kovacs, *Rules About Rulemaking*, *supra* note 24, at 526, 551; Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the “Hard Look”*, 92 NOTRE DAME L. REV. 331, 349 (2016).

337. S. DOC. NO. 79-248 (1946), *reprinted in* LEGISLATIVE HISTORY, *supra* note 218, at 20 (internal quotation marks omitted).

requiring agencies to provide public notice of their proposed rules and an opportunity for the public to comment.<sup>338</sup> These procedures locate rulemaking among “the most open and deliberative of any processes in American federal governance.”<sup>339</sup>

Development of executive orders and other presidential statements, in contrast, often involves no public input.<sup>340</sup> Like an agency, the Statutory President needs that feedback to ensure that their decisions are “fair and intelligent.”<sup>341</sup> Moreover, the political nature of the presidency may incline Presidents to a biased view of the facts. Public input can “counter questionable presidential factual assertions.”<sup>342</sup> The next section debunks the argument that presidential elections give the President all the feedback they need.

## 2. Political accountability

In her seminal article, *Presidential Administration*, then-Professor Elena Kagan argued that presidential involvement in agency policymaking enhances accountability by establishing an “electoral link between the public and the bureaucracy, increasing the latter’s responsiveness to the former.”<sup>343</sup> Other scholars assert that the President’s electoral accountability legitimizes agency decisionmaking.<sup>344</sup> Along the same lines, Stack asserted that the President’s decisions face a “greater political check” than those of agencies.<sup>345</sup> That political accountability, he contended, obviates the need for procedural constraints in presidential decisionmaking, at least with regard to *Chevron* deference.<sup>346</sup>

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338. 5 U.S.C. § 553(b)–(c) (2018); see also William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1371–72 (2018).

339. Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 612 (2018).

340. J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1744 (2018).

341. COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 102 (1941).

342. Mark Seidenfeld, Comment, *A Process-Based Approach to Presidential Exit*, 67 DUKE L.J. 1775, 1784 (2018).

343. Kagan, *supra* note 54, at 2332.

344. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–53 (1997); Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 58–70 (1995); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL’Y 227, 229 (1998); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 102–03 (1994).

345. Stack, *Statutory President*, *supra* note 8, at 596.

346. *Id.* at 592.

Political accountability via presidential elections, however, is not sufficient.<sup>347</sup> Presidential elections are held only every four years; a fraction of the population votes; and a candidate need not win the popular vote to become President.<sup>348</sup> Between elections and after a President is reelected, “the electorate has few effective tools to hold presidents accountable for even the most disastrous regulatory failures.”<sup>349</sup> Moreover, numerous issues clog the agenda in federal elections.<sup>350</sup> Voters often do not know about regulatory issues, much less understand them,<sup>351</sup> and most cast their votes based on “factors such as experience and temperament” rather than policy issues.<sup>352</sup> Even voters who are sensitive to regulatory policy issues may have to compromise their positions on those issues “to advance other deeply held commitments.”<sup>353</sup> In any event, even if a majority preference on a particular regulatory issue is discernable, the President has no obligation to follow it.<sup>354</sup> Interest groups may sway Presidents while in office, especially because elections are so expensive.<sup>355</sup> Thus, the President is not politically accountable to the people via elections in a meaningful way.<sup>356</sup>

Agencies are more accountable to the people than the President,<sup>357</sup> in part because of the APA. “[T]he openness of agency decision making to public scrutiny . . . is itself a guarantee of public accountability.”<sup>358</sup> Bressman and Vandenberg demonstrated that, in rulemaking, agencies are more responsive to the public than the White House is because agencies “gather more public input and receive more public scrutiny, both of which tend to ensure that they will better assess public preferences and resist parochial

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347. See Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441, 457–60 (2010); Roisman, *supra* note 43, at 880–81; Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83 (2005).

348. PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 180 (2009); Criddle, *supra* note 347, at 458; *Voter Turnout in Presidential Elections*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> (last visited June 22, 2020).

349. Criddle, *supra* note 347, at 462; see also Mashaw & Berke, *supra* note 339, at 611.

350. See McGarity, *supra* note 285, at 476; Mendelson, *supra* note 54, at 1160.

351. Criddle, *supra* note 347, at 460.

352. Criddle, *supra* note 347, at 458; see also Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1817 (2007).

353. Criddle, *supra* note 347, at 459.

354. Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1416–18 (2013).

355. *Id.* at 1418–21; see also Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1305–06 (2006).

356. See SHANE, *supra* note 348, at 159.

357. McGarity, *supra* note 285, at 457.

358. SHANE, *supra* note 348, at 160.



pressures.”<sup>359</sup> Thus, APA procedures may produce more political accountability than presidential orders.<sup>360</sup>

In addition to the public notice and comment requirements discussed above,<sup>361</sup> the APA requires agencies to provide a concise general statement of a rule’s basis and purpose.<sup>362</sup> Although the agency’s explanation for its rule need not be elaborate,<sup>363</sup> this requirement enables political accountability.<sup>364</sup> Absent an explanation, accountability withers. Even if accountability via presidential elections were sufficient, it is difficult for voters to judge the Statutory President at the ballot box without an explanation for presidential decisions. Furthermore, if the President does not explain the rationale for an action, there is little chance of ensuring that the President’s decision satisfies the minimum rationality required of government action.<sup>365</sup> Thus, the Statutory President should provide an explanation for their decision, just as any Secretary would.<sup>366</sup>

### 3. *Transparency*

Agency accountability and public participation require transparency. “[D]isclosing how and why [the government] makes decisions”<sup>367</sup> enables the public to assign “blame or credit.”<sup>368</sup> Not surprisingly, transparency is among the APA’s central values.<sup>369</sup>

One way the APA pursues transparency is through publication requirements. The Federal Register Act of 1935 required agencies to publish

359. Bressman & Vandenberg, *supra* note 53, at 83 (discussing the Environmental Protection Agency).

360. *Id.* at 84.

361. *See supra* text accompanying notes 332–342.

362. 5 U.S.C. § 553(c) (2018).

363. Kovacs, *Rules About Rulemaking*, *supra* note 24, at 529, 531–32, 544.

364. Buzbee, *supra* note 338, at 1366–67.

365. *Cf.* Stack, *Reviewability*, *supra* note 43, at 1208 (suggesting that judicial review incentivizes the President to provide some explanation for their action, which “has a transparency-enforcing effect”).

366. *See* Seidenfeld, *supra* note 342, at 1777.

367. Adam Candeub, *Transparency in the Administrative State*, 51 HOUS. L. REV. 385, 386 (2013); *see also* Elizabeth Figueroa, *Transparency in Administrative Courts: From the Outside Looking in*, 35 J. NAT’L ASS’N ADMIN. L. JUDICIARY 1, 6 (2015) (exploring definitions of transparency).

368. Mendelson, *supra* note 54, at 1160 (quoting Kagan, *supra* note 54, at 2333); *see also id.* at 1134 (“An agency may be accountable . . . if it is obligated to disclose and justify its actions—and to suffer consequences . . . .”); Rubin, *supra* note 347, at 2119 (“As used in ordinary language, accountability refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation.”).

369. *See* Brown, *supra* note 326, at 636; Knowles, *supra* note 266, at 929, 933. *But see* William Funk, *Public Participation and Transparency in Administrative Law—Three Examples as an Object Lesson*, 61 ADMIN. L. REV. 171, 173 (2009) (pointing out that the APA’s commitment to transparency was limited “because the APA was predicated on protecting persons whose legal rights were affected by agency action”).

their substantive regulations.<sup>370</sup> The APA expanded that requirement to cover rules of agency organization and procedure, as well as policy statements and interpretations.<sup>371</sup>

A second method of pursuing transparency is through administrative records. The APA itself does not require agencies to produce a record or docket in informal rulemaking.<sup>372</sup> Nonetheless, courts require agencies to produce an administrative record of material the decisionmaker considered in reaching a final decision.<sup>373</sup> The administrative record enables public participation in the rulemaking, and it constitutes “the body of information the agency relies on in promulgating its final rule,” which is then subject to judicial review.<sup>374</sup>

Kagan argued that presidential administration “enhances transparency”<sup>375</sup> insofar as it enables the public to “understand the sources and levers of bureaucratic action.”<sup>376</sup> Transparency, she argued, restricts the President’s “freedom to play parochial interests.”<sup>377</sup> The more open the President’s policymaking, the more likely it is to reflect “broad public sentiment.”<sup>378</sup>

If Kagan was correct in 2001, she is no longer. Now presidential decisionmaking often takes place “in a black box with little to no transparency.”<sup>379</sup> The Federal Register Act required publication of any presidential proclamation or Executive Order that has “general applicability and legal effect” and is effective against the public.<sup>380</sup> President Kennedy published an Executive Order laying out the process for preparing such proclamations and orders, which subsequent presidents have updated.<sup>381</sup> Unfortunately, the publication requirement did not prevent President Trump

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370. Federal Register Act of 1935, Pub. L. No. 74-220, § 5(a), 49 Stat. 500, 501 (codified at 44 U.S.C. § 1505(a)(2) (2012)); Shepherd, *supra* note 198, at 1580.

371. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237, 238 § 3(a) (1946) (codified at 5 U.S.C. § 552(a) (2012)); *see also* Kovacs, *Superstatute Theory*, *supra* note 13, at 1231.

372. Kovacs, *Rules About Rulemaking*, *supra* note 24, at 534–38.

373. Gavoor & Platt, *supra* note 290, at 26–29; *see also* Kovacs, *Rules About Rulemaking*, *supra* note 24, at 551 (acknowledging that “judicial review necessitates some sort of record,” but urging the courts to “leave judgments about balancing the benefits and burdens of rulemaking procedure to Congress”).

374. CHARLES H. KOCH, JR. & RICHARD MURPHY, 1 *ADMINISTRATIVE LAW AND PRACTICE* § 4:44 (3d ed. 2018); *see also* Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 *ADMIN. L. REV.* 629, 641 (2017).

375. Kagan, *supra* note 54, at 2331.

376. *Id.* at 2332.

377. *Id.* at 2337.

378. *Id.*

379. Kovacs, *Rules About Rulemaking*, *supra* note 24, at 563; *see also* COOPER, *supra* note 23, at 109.

380. 44 U.S.C. § 1505(a)(1) (2018).

381. Exec. Order No. 11,030, 27 Fed. Reg. 5847 (June 19, 1962); John C. Duncan, Jr., *A Critical Consideration of Executive Orders: Glimmerings of Autopoiesis in the Executive Role*, 35 *VT. L. REV.* 333, 341 (2010).

from issuing his first “travel ban” without the review required by Kennedy’s procedural Executive Order.<sup>382</sup> When an agency fails to adhere to its own procedural rules, the administrative record reveals that failure.<sup>383</sup> Unlike an agency, however, the Statutory President need not reveal how they reached their decision, who influenced them, or what information they considered.<sup>384</sup>

Nina Mendelson argued that presidential supervision of agency rulemaking can lend legitimacy to agency policymaking but only if it is transparent.<sup>385</sup> Presidential involvement can be either good or bad “depending on the content of the influence.”<sup>386</sup> If the public does not know the content of presidential influence, she continued, it may not serve “as a source of legitimacy for the administrative state.”<sup>387</sup> Hence, Mendelson suggested that White House influence be disclosed as part of the agency rulemaking process.<sup>388</sup>

Similarly, for the Statutory President’s decisionmaking to be legitimate, it must be transparent.<sup>389</sup> Interpreting the APA as written and treating the Statutory President like an “agency” would enhance that transparency. Where the President acts as Congress’s delegate, the administrative record would include documents leading up to the President’s order to the same extent as any other statutory delegate.<sup>390</sup> The record should reflect who the President heard from, what their arguments were, and what the President read.<sup>391</sup> As Thomas McGarity asserted, requiring that presidential contacts “be reduced to writing and placed in the administrative record would be a

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382. See Jon Schwartz, *Trump Muslim Ban Executive Order Violated Executive Order About Executive Orders*, THE INTERCEPT (Feb. 3, 2017, 7:01 PM), <https://theintercept.com/2017/02/03/trump-muslim-b-an-executive-order-violated-executive-order-about-executive-orders/> [<https://perma.cc/NJ84-V47K>]; Press Release, Senator Dick Durbin, Senate Judiciary Democrats: Is DOJ Doing Its Job To Review Trump Executive Orders? (Jan. 30, 2017), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-senate-judiciary-democrats-is-doj-doing-its-job-to-review-trump-executive-orders> [<https://perma.cc/2Q2E-GTEL>].

383. See, e.g., Policy & Research, LLC v. U.S. Dep’t of Health & Human Servs., 313 F. Supp. 3d 62, 83 (D.D.C. 2018); Bodeux v. U.S. I.N.S., 668 F. Supp. 1452, 1453 (D. Kan. 1987); Norwich Eaton Pharm., Inc. v. Bowen, 645 F. Supp. 321, 323 (S.D. Ohio 1986), *rev’d*, 808 F.2d 486 (6th Cir. 1987); CityFed Fin. Corp. v. Fed. Home Loan Bank Bd., 615 F. Supp. 1122, 1131–32 (D.D.C. 1985); Chenoweth v. Weinberger, 376 F. Supp. 1338, 1339 (W.D. Mo. 1974).

384. Mashaw & Berke, *supra* note 339, at 558, 611.

385. Mendelson, *supra* note 54, at 1130.

386. *Id.* at 1130; *see also id.* at 1141.

387. *Id.* at 1130.

388. *Id.* at 1164; *see also* Criddle, *supra* note 347, at 486.

389. *Cf.* Nina A. Mendelson, *Another Word on the President’s Statutory Authority over Agency Action*, 79 FORDHAM L. REV. 2455, 2474 n.92 (2011) (“greater transparency is necessary for presidential control to serve any legitimating function for the administrative state”).

390. See Criddle, *supra* note 347, at 486; *cf.* McGarity, *supra* note 285, at 460–61.

391. *Cf.* McGarity, *supra* note 285, at 445 (“the content of significant presidential contacts with the agencies should be placed in the records of any adjudications or rulemakings that those contacts are intended to affect”).

relatively unintrusive congressional limitation on presidential prerogatives.”<sup>392</sup>

In sum, all of the Statutory President’s orders and rules of procedure should be published and codified, and the documents the Statutory President considered in reaching a decision should be included in the administrative record, absent privilege.

#### 4. *Deliberation*

The APA explicitly requires agencies to “consider[] . . . the relevant matter presented” in the rulemaking process.<sup>393</sup> The Supreme Court observed that notice-and-comment rulemaking was “designed to assure due deliberation.”<sup>394</sup> It “tend[s] to foster the fairness and deliberation that should underlie a pronouncement” that is legally binding on the public.<sup>395</sup> Indeed, rulemaking may be “the most open and deliberative of any processes in American federal governance.”<sup>396</sup>

The public interest demands that agency decisions reflect deliberation, not raw politics.<sup>397</sup> Peter Shane posited that “our best instrument for elevating public interest over faction” is “an extended democratic conversation during which multiple interests and perspectives are brought to bear and momentary passions are perhaps cooled with time for reflection.”<sup>398</sup> That sort of open process results in “wiser” decisions.<sup>399</sup> As Thomas McGarity observed, “There is little reason . . . to believe that interjecting ad hoc, overtly political considerations will result in sounder rules.”<sup>400</sup>

Agency decisions are expected to be based on expertise, not politics. Expertise is the rationale for assigning different problems to different agencies.<sup>401</sup> Those subject-matter delegations give agencies “unique

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392. *Id.* at 487.

393. 5 U.S.C. § 553(c) (2018).

394. *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

395. *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

396. *Mashaw & Berke*, *supra* note 339, at 612.

397. *See* Criddle, *supra* note 347, at 448–49; Seidenfeld, *supra* note 354, at 1403; Glen Staszewski, Response *The Challenges of Fiduciary Administration*, 88 TEX. L. REV. SEE ALSO 155, 159 (2009).

398. SHANE, *supra* note 348, at 183.

399. *Id.* at 25; Seidenfeld, *supra* note 342, at 1785; *see also* Buzbee, *supra* note 338, at 1406.

400. McGarity, *supra* note 285, at 452–53.

401. *See* COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 19 (1941); W. Andrew Jack, Note, *Executive Orders 12,291 and 12,498: Usurpation of Legislative Power or Blueprint for Legislative Reform?*, 54 GEO. WASH. L. REV. 512, 534 (1986).

institutional advantages—to address a set of problems with expert, nonpolitical decision making.”<sup>402</sup>

Presidents, in contrast, are political actors; they generally evaluate policies from a political perspective, making them “inherently non-deliberative.”<sup>403</sup> Greater presidential control yields less deliberation within the Executive Branch.<sup>404</sup> It “tends to short-circuit or undercut the deliberative processes that make agency decisionmaking democratically accountable.”<sup>405</sup> Peter Shane minced no words in asserting that “the growth of executive power is all too likely to produce dysfunctional government”; it “breeds an insularity, defensiveness, and even arrogance within the executive branch that undermines sound decision making, discounts the rule of law, and attenuates the role of authentic deliberation in shaping political outcomes.”<sup>406</sup>

Furthermore, Presidents lack expertise.<sup>407</sup> They may not be competent to “identify and understand the trade-offs” in complex policy decisions.<sup>408</sup> Kevin Stack reasoned that the President’s lack of expertise is not a problem, because a President may call on experts in agencies to assist in decisionmaking.<sup>409</sup> Unfortunately, in recent years, Presidents have not done this with sufficient regularity.<sup>410</sup>

Treating the Statutory President like an agency under the APA would force the President to consider alternative positions and solutions. It would combat the inherently political, non-deliberative nature of presidential decisionmaking, hopefully yielding sounder policies.<sup>411</sup>

### 5. Uniformity

Finally, one of Congress’s central purposes in enacting the APA was to impose some uniformity on administrative procedure.<sup>412</sup> Congress aimed to

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402. Daniel P. Rathbun, Note, *Irrelevant Oversight: “Presidential Administration” from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643, 665 (2009); see also SHANE, *supra* note 348, at 164; Buzbee, *supra* note 338, at 1367.

403. Seidenfeld, *supra* note 354, at 1423; see also Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 504 (2003).

404. SHANE, *supra* note 348, at 183.

405. Mashaw & Berke, *supra* note 339, at 612; see also Buzbee, *supra* note 338, at 1433.

406. SHANE, *supra* note 348, at 25.

407. See Seidenfeld, *supra* note 354, at 1423.

408. *Id.* at 1422; see also Buzbee, *supra* note 338, at 1433.

409. Stack, *Statutory President*, *supra* note 8, at 591; Stack, *supra* note 329, at 309.

410. See, e.g., Driesen, *supra* note 43, at 1048; Arthur S. Leonard, *Bowing to Reality, Trump Administration Responds to Six Court Losses by Dropping Appeals in Transgender Military Cases*, 2018 LGBT L. NOTES 1, 4; Schwartz, *supra* note 382; Press Release, Senator Dick Durbin, *supra* note 382.

411. See Seidenfeld, *supra* note 354, at 1423.

412. Kovacs, *Superstatute Theory*, *supra* note 13, at 1229–30.

make dealing with administrative agencies less confusing and more fair.<sup>413</sup> Accordingly, in the APA, Congress abandoned the Walter-Logan Bill's approach of exempting particular agencies and opted instead to "deal with types of functions as such."<sup>414</sup> The APA was "meant to be operative 'across the board.'"<sup>415</sup> The broad definition of "agency" reflects that desire for uniformity.<sup>416</sup>

Uniformity carries a strong normative valence in both procedure<sup>417</sup> and judicial review.<sup>418</sup> Hence, when the *Franklin* Court inserted an exemption for the President into the definition of "agency," it undermined one of the APA's core normative commitments. The President acting as Congress's statutory delegate should be subject to the same requirements as any other statutory delegate.

## 6. Objections

Some might object that applying the APA's procedural requirements to the President would impose an unacceptable burden on the office. That objection holds no water. First, if the APA is read properly, its requirements are quite reasonable. The rulemaking provisions of the APA, for example, are bare bones, so applying them to the President would not be onerous.<sup>419</sup> Second, employees in the Executive Office of the President would do the work.<sup>420</sup> The President's only real additional obligations would be to deliberate and explain—obligations that seem quite reasonable given the gravity of the decisions Congress has delegated to the Statutory President. Third, the APA's exceptions, if interpreted properly, provide the flexibility

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413. H.R. REP. NO. 76-1149, at 3 (1939); S. REP. NO. 76-442, at 9–10 (1939) (same); S. REP. NO. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 218, at 187.

414. S. REP. NO. 79-752 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 218, at 191; see also *id.* at 192.

415. H.R. REP. NO. 79-1980 (1945), reprinted in LEGISLATIVE HISTORY, *supra* note 218, at 250.

416. Thomas G. Field, Jr., Craig Allen Nard & John F. Duffy, *Dickinson v. Zurko: An Amicus Brief*, 4 MARQ. INTELL. PROP. L. REV. 49, 54, 56, 67 (2000); Kovacs, *Superstatute Theory*, *supra* note 13, at 1229.

417. See Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 317 (2001); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1367 (2010); Metzger, *supra* note 326, at 1303; Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1447 (1994).

418. See Andrew S. Hirsch, *Dismissing Derivative Actions in the Federal Courts for Failure to Allege Demand Futility: Choosing a Standard of Appellate Review—Abuse of Discretion or De Novo?*, 64 EMORY L.J. 201, 218 (2014).

419. See Kovacs, *Rules About Rulemaking*, *supra* note 24, at 532–44.

420. Cf. Mendelson, *supra* note 54, at 1147 (pointing out that presidential supervision of agency rulemaking proceeds through the Office of Management and Budget).

the President needs to remain effective.<sup>421</sup> In this regard, the Statutory President is like any other agency: effective governance requires some flexibility.<sup>422</sup>

If the APA's procedures are too burdensome for the Statutory President, then Congress should rethink statutory delegations to the President. For any part of the Executive Branch to make binding policy decisions without the transparency, public participation, and deliberation the APA generates is deeply problematic. Thus, many of the APA values discussed above challenge the wisdom of statutory delegations to the President entirely.

### B. Judicial Review

Subjecting the Statutory President to judicial review under the APA would further advance the values discussed above. In addition, it would ensure that the President acts within the scope of statutory authority and that their decisions are reasonable and consistent with the record.

#### I. Under the APA

To the Congresses that developed the APA in the 1930s and 1940s, judicial review of administrative action was vital to protect individual liberties and avoid administrative overreach.<sup>423</sup> The totalitarianism sweeping Europe at the time inspired administrative reform in the U.S.<sup>424</sup> Many Americans feared Franklin Delano Roosevelt's dictatorial tendencies and did not trust government agencies to protect their interests.<sup>425</sup> Rather, Americans expected the federal courts to stem the tide of totalitarianism.<sup>426</sup> Allowing agencies to take action with the force of law without erecting judicial review as a backstop was viewed as approaching totalitarianism.<sup>427</sup>

Judicial review also helped to counterbalance delegations to agencies.<sup>428</sup> Early in the New Deal era, the Supreme Court struck down regulatory

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421. See Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973, 982 (2012) ("an effective executive needs flexibility and discretion to respond to fastpaced events"); see also Ruhl & Salzman, *supra* note 340, at 1746 (explaining that presidential policy reversal is quicker than legislative or administrative reversal).

422. Thomas O. McGarity, *Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA*, 67 GEO. L.J. 729, 750–53 (1979).

423. Kovacs, *Leveling*, *supra* note 182, at 608.

424. Schiller, *Free Speech*, *supra* note 250, at 75, 85–86.

425. *Id.*; Kovacs, *History*, *supra* note 210, at 683–86, 695–96.

426. Schiller, *Free Speech*, *supra* note 250, at 75–76.

427. Kovacs, *History*, *supra* note 210, at 686 & n.87.

428. See Merrill, *supra* note 327, at 73; Stack, *Reviewability*, *supra* note 43, at 1200; see also *Touby v. United States*, 500 U.S. 160, 170 (1991) (Marshall, J., concurring) ("[J]udicial review perfects

schemes for unconstitutionally delegating authority to agencies.<sup>429</sup> Daniel Rodriguez and Barry Weingast explained recently that the Supreme Court in those and other cases provided Congress with a “how-to manual” for delegating authority to agencies.<sup>430</sup> Providing for judicial review of agency action was one of the Supreme Court’s conditions for ending its assault on regulatory statutes under the non-delegation doctrine.<sup>431</sup>

One function of judicial review, then, is to ensure that agencies act within the scope of their authority.<sup>432</sup> Public actors must have legal authorization for their actions; they have only limited powers, and the federal courts may police the boundaries of legal authorization.<sup>433</sup> Kevin Stack asserted that, if the constitutional minimum in Article III requires a federal court to be available to consider issues of federal law, that must include “review of the scope of authorization granted by statute.”<sup>434</sup>

The APA’s judicial review provisions, however, extend beyond ensuring that agencies act within the limits of their statutory authority.<sup>435</sup> The APA instructs courts to set aside agency action that is “not in accordance with law,” as well as agency action that is “arbitrary, capricious, [or] an abuse of discretion.”<sup>436</sup> In other words, under the APA, courts review not just the existence of agency authority, but also the exercise of that authority.<sup>437</sup> In the New Deal era, the Supreme Court allowed Congress to delegate authority to agencies on the condition that courts could ensure that those agencies exercised reasoned decisionmaking.<sup>438</sup> Of course, application of the arbitrary or capricious standard has drifted over the years from its original conception of ensuring a “minimally rational basis” for agency action to “hard look” review.<sup>439</sup> Nonetheless, the inclusion of the arbitrary

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a delegated-lawmaking scheme by assuring that the exercise of such power remains within statutory bounds.”); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) (“The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”).

429. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935).

430. Rodriguez & Weingast, *supra* note 199, at 11, 39–40, 45, 56.

431. *Id.* at 9; see also Rodriguez, *supra* note 245, at 755.

432. JAFFE, *supra* note 428, at 321.

433. Stack, *Reviewability*, *supra* note 43, at 1199.

434. *Id.* at 1200. *But see* *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (“There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention.”); Merrill, *supra* note 327, at 81–82 (discussing “Congress’s long recognized power to make certain kinds of executive action unreviewable”).

435. 5 U.S.C. § 706 (2018).

436. § 706(2)(A).

437. Stack, *Reviewability*, *supra* note 43, at 1188.

438. See Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 *COLUM. L. REV.* 1953, 1961 (2015); Merrill, *supra* note 327, at 73.

439. Merrill, *supra* note 438, at 1963; see also Scott A. Keller, *Depoliticizing Judicial Review of Agency Rulemaking*, 84 *WASH. L. REV.* 419, 430 (2009).



or capricious standard in the APA indicates some intention to extend judicial review beyond ensuring that agencies act “in accordance with law.”<sup>440</sup> Scholars view this extended form of judicial review as one of the key mechanisms for ensuring agency accountability.<sup>441</sup>

## 2. *Of the Statutory President*

Yet, the Statutory President does not face that form of judicial review. Judicial review of the Statutory President’s actions is available, but it is flawed.<sup>442</sup> As explained above, some federal courts are willing to ensure that the President has acted within the scope of statutory and constitutional authority.<sup>443</sup> Beyond that, however, the Statutory President’s actions are not reviewable. As William Yeatman explained with regard to President Trump’s decision to redirect military construction funds to build a wall between the U.S. and Mexico, “courts won’t scrutinize the president’s decision that a ‘national emergency’ exists. Nor will courts perform a meaningful inquiry of the relationship between the putative national emergency and the border wall. That is, they won’t question if the wall is a reasonable policy to mitigate the supposed national emergency.”<sup>444</sup>

The Statutory President’s actions should be reviewed under the same standard as any other statutory delegate.<sup>445</sup> Plainly, the APA’s text provides no exemption for the President.<sup>446</sup> Indeed, members of Congress on both sides of the aisle agreed that the judicial review provisions should apply to all agencies uniformly.<sup>447</sup> Uniformity was among their central goals in enacting the APA.<sup>448</sup>

Furthermore, Congress is incapable of policing the Statutory President; hence, judicial intervention is critical.<sup>449</sup> Our commitment to judicial review as a means of ensuring administrative accountability must extend to the President when acting pursuant to a statutory delegation.<sup>450</sup> Thomas Merrill

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440. § 706(2)(A).

441. See, e.g., Mendelson, *supra* note 54, at 1134; Wendy E. Wagner, Response, *Assessing Asymmetries*, 93 TEX. L. REV. SEE ALSO 91, 92 (2015); cf. Rubin, *supra* note 347, at 2119 (stating that “accountability refers to the ability of one actor to demand an explanation or justification of another actor for its actions and to reward or punish that second actor on the basis of its performance or its explanation”).

442. See Merrill, *supra* note 438, at 1983.

443. See *supra* Part I.F.

444. William Yeatman, *Congress Isn’t Only Branch Enabling Trump’s Emergency Threats*, CATO AT LIBERTY (Jan. 24, 2019, 1:26 PM), <https://www.cato.org/blog/congress-isnt-only-branch-enabling-trumps-emergency-threats> [<https://perma.cc/3U6T-7EEG>].

445. See Driesen, *supra* note 43, at 1044; Stack, *Reviewability*, *supra* note 43, at 1211.

446. 5 U.S.C. § 551(1) (2018).

447. Kovacs, *Superstatute Theory*, *supra* note 13, at 1229.

448. *Id.*

449. See Stack, *Statutory President*, *supra* note 8, at 542, 579–81.

450. Stack, *Reviewability*, *supra* note 43, at 1201.

predicted that without adequate judicial review, presidential administration would turn to “power politics” and result in “tragedy for our ongoing experiment in democratic government.”<sup>451</sup>

Kevin Stack demonstrated that the Statutory President’s actions should be subject to judicial review,<sup>452</sup> but he advocated for review only to determine whether the President acted within the scope of the statutory delegation.<sup>453</sup> “The core idea,” he said, “is that when the President asserts statutory authority, his actions must fall within the authority granted by statute, just like an agency.”<sup>454</sup>

Stack was right but did not go far enough. Stack argued that the President’s statutory actions should be reviewed under an *ultra vires* framework from cases predating the APA.<sup>455</sup> This would allow judicial review of any “issue . . . that bears on the validity of the [President’s] claim of authority.”<sup>456</sup> Like any statutory delegate, though, the President may act within the scope of statutory authority and nonetheless act in a way that is arbitrary or capricious.<sup>457</sup> Stack’s *ultra vires* framework does not specify a standard of review<sup>458</sup> much less authorize review of the President’s actions for abuse of discretion or arbitrariness.

Similarly, David Driesen advocated for judicial review of certain presidential actions but stopped short of endorsing full APA review. He said that executive orders should be reviewed under an arbitrary or capricious standard of review to keep the President within the bounds of the statutory delegation and avoid non-delegation problems.<sup>459</sup> He pointed out that judicial review is even more important for the President than for agencies because a President may believe that their election gave them a mandate to change the law.<sup>460</sup> Thus, there is a greater risk that a President will “subvert an entire body of law.”<sup>461</sup> Yet, Driesen also argued that the arbitrary or capricious standard should be “tailor[ed]” to reduce the risk of a court invalidating a presidential action improperly.<sup>462</sup> Essentially, he contended that courts should be particularly deferential to the Statutory President.<sup>463</sup>

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451. Merrill, *supra* note 438, at 1983.

452. Stack, *Statutory President*, *supra* note 8, at 543.

453. Stack, *Reviewability*, *supra* note 43, at 1177, 1199.

454. *Id.* at 1211; *see also* Merrill, *supra* note 438; Stack, *Statutory President*, *supra* note 8, at 541.

455. Stack, *Reviewability*, *supra* note 43, at 1201.

456. *Id.* at 1202. The Federal Circuit’s continued resistance to Stack’s unimpeachable analysis is mind-boggling. *See* Merrill, *supra* note 438, at 1981; *supra* text accompanying notes 165–181.

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

458. Stack, *Reviewability*, *supra* note 43, at 1205, 1206–07.

459. Driesen, *supra* note 43, at 1044, 1045–46.

460. *Id.* at 1049.

461. *Id.*; *see also id.* at 1051.

462. *Id.* at 1059.

463. *Id.*

His version of the arbitrary or capricious standard as applied to the Statutory President would “detect faithless execution of the law,” but not “errors in judgment.”<sup>464</sup>

In a recent American Constitution Society Issue Brief, Alan Morrison seemed to go further.<sup>465</sup> He contended that judicial review of statutory claims against the President is needed to maintain fidelity to the rule of law.<sup>466</sup> Beyond that, Morrison said “APA review could be extremely helpful . . . in promoting government transparency and accountability.”<sup>467</sup> As Driesen pointed out, elections can inspire Presidents to make policy based on the policy’s apparent popularity rather than fully informed consideration.<sup>468</sup> If the Statutory President is subject to review under the APA, Morrison posited, “he will have to spend more time and be more careful with what he does and how he explains it.”<sup>469</sup> In other words, full APA review of the Statutory President’s actions would inspire deliberation and transparency. Thus, full APA review is not only consistent with the text and purposes of the APA, but also furthers the norms embodied in the APA. Lastly, overturning *Franklin v. Massachusetts* would eliminate the confusion in the circuits about the extent to which the Statutory President’s actions are reviewable.<sup>470</sup>

### 3. *Objections*

Those who objected to applying the APA’s procedural requirements to the Statutory President would again object that applying the judicial review provisions would impose an unacceptable burden on the office of the President. That objection warrants the same response here. Again, it is not the President who would be burdened, but the Executive Office of the President and the Department of Justice. Thus, APA claims against the Statutory President would pose no unacceptable danger of distraction.<sup>471</sup> Moreover, the APA’s exceptions would insulate many of the Statutory President’s decisions from judicial scrutiny.<sup>472</sup> For those claims that proceed to judgment, the courts would retain their equitable discretion to

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464. *Id.* at 1060.

465. Morrison, *supra* note 44, at 18.

466. *Id.*

467. *Id.* at 19.

468. Driesen, *supra* note 43, at 1049.

469. Morrison, *supra* note 44, at 22.

470. *See supra* Part I.F.

471. *See Siegel, supra* note 43, at 1674.

472. *See supra* text accompanying notes 257–284.

mold a remedy appropriate to the situation.<sup>473</sup> Finally, if judicial review under the APA is too burdensome for the Statutory President, then perhaps Congress should not delegate statutory duties to the President.

One might object that applying the APA's judicial review provisions to the Statutory President is unnecessary, because a plaintiff can wait and sue the agency when it implements the President's order.<sup>474</sup> But in such circumstances, the agency has no discretion to decline to follow the President's order, so the decision to do so is unreviewable.<sup>475</sup> In *Sherley v. Sebelius*,<sup>476</sup> for example, plaintiffs challenged the National Institutes of Health's (NIH) failure to respond to their comments on guidelines related to research using embryonic stem cells.<sup>477</sup> The comments, however, objected categorically to research using embryonic stem cells, which the Court recognized was contrary to President Obama's executive order supporting such research.<sup>478</sup> The Court pointed out that "NIH may not simply disregard an Executive Order."<sup>479</sup> The plaintiffs' "comments simply did not address any factor relevant to implementing the Executive Order"; hence, ignoring them was not arbitrary or capricious.<sup>480</sup> *How* the agency implements the order—any discretionary element of the policy—is reviewable, but challenging the decision itself requires the President as defendant.<sup>481</sup> Moreover, suing the implementing agency is not a satisfactory alternative because the agency's explanation for the policy may not reflect the President's rationale; the agency may supply facts and justifications of which the President was not even aware. Suing the implementing agency, then, allows *post hoc* justifications; suing the President incentivizes honing policy *ab initio*.

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473. See 5 U.S.C. § 702 (2018) ("Nothing herein . . . affects . . . the power or duty of the court to . . . deny relief on any other appropriate legal or equitable ground . . ."); see also Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 DUKE L.J. 291, 312–15 (2003).

474. *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring in part and concurring in the judgment); cf. Kagan, *supra* note 54, at 2351, 2369; Manheim & Watts, *supra* note 43, at 1773, 1778; Schwartz, *supra* note 43, at 172; Stack, *Statutory President*, *supra* note 8, at 555–56.

475. Cf. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004) (holding that where a presidential order deprives an agency of discretion, the agency need not analyze the environmental effects of its action). Jonathan Siegel anticipated this development in 1997. Siegel, *supra* note 43, at 1620.

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

477. *Id.*

478. *Id.* at 784.

479. *Id.*

480. *Id.* at 785.

481. See *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004) ("the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium").

One might also argue that APA review of the Statutory President is unimportant because nonstatutory review is already available.<sup>482</sup> But nonstatutory review is not an adequate alternative to the APA. To begin, the jurisprudence of nonstatutory review is muddled and confusing.<sup>483</sup> Nonstatutory review is grounded on the legal fiction that an officer who is acting unconstitutionally or ultra vires is not acting on behalf of the sovereign and thus is not protected by the sovereign's immunity.<sup>484</sup> Jonathan Siegel warned that forgetting that such a legal fiction is indeed fiction leads to harmful results.<sup>485</sup> Certainly, it is preferable to rely on positive law, like the APA, rather than so amorphous a concept as nonstatutory review.<sup>486</sup>

Furthermore, nonstatutory review is "quite narrow."<sup>487</sup> First, it is available only where the plaintiff has no other "meaningful and adequate means of vindicating its statutory rights."<sup>488</sup> Second, it does not allow the court to review the exercise of discretion. Again, an officer acting outside the scope of their authority does not enjoy sovereign immunity. Conversely, an officer acting within the scope of their authority is acting for the sovereign and hence is protected by sovereign immunity.<sup>489</sup> Consequently, nonstatutory review only opens the courthouse doors to claims alleging that an officer has acted outside the scope of their authority.<sup>490</sup> *Franklin* was itself a nonstatutory review case.<sup>491</sup> There the Court emphasized that it would not review the President's action for abuse of discretion.<sup>492</sup> "Garden-variety errors of law or fact are not enough" either.<sup>493</sup> Many courts require violation of a "clear statutory mandate" to pursue nonstatutory review.<sup>494</sup>

Third, nonstatutory review entails no particular standard of review. In nonstatutory review cases against the President, then, one might expect the

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482. Siegel, *supra* note 43, at 1613; Stack, *Reviewability*, *supra* note 43, at 1193; Stack, *Statutory President*, *supra* note 8, at 555.

483. Kovacs, *Scalia's Bargain*, *supra* note 200, at 1163; Siegel, *supra* note 43, at 1645, 1655.

484. See *supra* text accompanying note 135.

485. Siegel, *supra* note 43, at 1645–47.

486. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 190 (D.C. Cir. 2006) (opining that nonstatutory review "represents a more difficult course" than "review under the APA").

487. *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 307 (D.C. Cir. 2014); see also John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 149 (1998); Kovacs, *Revealing Redundancy*, *supra* note 134, at 107–10.

488. *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 43 (1991), quoted in *Puerto Rico v. United States*, 490 F.3d 50, 59 (1st Cir. 2007).

489. Kovacs, *Revealing Redundancy*, *supra* note 134, at 90.

490. See *id.* at 107–08 (discussing *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543 (10th Cir. 2001)).

491. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

492. *Id.*; see also *Dalton v. Spector*, 511 U.S. 462, 474 (1994).

493. *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988).

494. Kovacs, *Revealing Redundancy*, *supra* note 134, at 108 & n.195 (citing cases).

standard of review to “be extremely generous.”<sup>495</sup> In short, APA review of presidential decisions avoids the complications of nonstatutory review and potential bars to its use, makes it clear that review is available, and establishes the standard of review.

Daphna Renan cautioned against over-reliance on judicial review to control Presidents effectively.<sup>496</sup> “Courts cannot solve the problems of constitutional governance,” she said, and the more we depend on them to do so, “the more fragile *judicial* norms (such as norms of judicial independence) may become.”<sup>497</sup> Peter Shane contributed that courts intercede in presidential decisionmaking “only episodically and are anxious about decision making in areas where they might lack expertise or could be perceived as intruding in policy making.”<sup>498</sup> They also are keenly aware that their remedial power is limited.<sup>499</sup> These points are well taken. Subjecting the Statutory President to judicial review under the APA, though, could assuage the courts’ reluctance to some degree by treating the President in that context like any other agency. In addition, subjecting the Statutory President to the APA’s procedural requirements would supplement judicial accountability.

#### IV. THE NEW MODEL

The prior sections made the legal and normative arguments for treating the Statutory President like an “agency” under the APA. This section paints a picture of what doing so would look like. Presidential decisions that are founded on delegated statutory authority and that have the force of law would be proceeded by publication of a draft decision, receipt and consideration of public comments, and publication of a final decision with an explanation for the decision. Judicial review would follow, employing an administrative record that would include some presidential documents and applying the arbitrary or capricious standard.<sup>500</sup> Adhering to the APA may have changed both the logistics and outcome of *Trump v. Hawaii* considerably.

##### A. *Trump v. Hawaii*

In President Trump’s first order, issued one week after his inauguration, he suspended entry into the U.S. of people from certain nations for ninety

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495. Siegel, *supra* note 43, at 1677.

496. Renan, *supra* note 43, at 2273, 2281.

497. *Id.* at 2273.

498. SHANE, *supra* note 348, at 29.

499. *Id.*

500. *See* 5 U.S.C. §§ 553(b)–(c), 706(2)(A) (2018).

days.<sup>501</sup> He did not seek public input on a draft. Indeed, he barely sought review within his own administration.<sup>502</sup> The final document provided little explanation beyond the bare assertions that some foreign nationals commit terrorist acts in the U.S. and that allowing people from the identified nations to enter “would be detrimental to the interests of the United States.”<sup>503</sup> The President’s defense of that order failed.<sup>504</sup>

The next order suspending entry of people from certain nations explained why “conditions in these countries present heightened threats”<sup>505</sup> and supported its assertions with information from the Departments of State and Justice.<sup>506</sup> Given those circumstances, the President made the judgment that “the risk of erroneously permitting entry of a national of one of these countries who intends to commit terrorist acts or otherwise harm the national security of the United States is unacceptably high.”<sup>507</sup> Lower courts enjoined that order,<sup>508</sup> but the Supreme Court stayed those injunctions pending review.<sup>509</sup>

The Proclamation at issue in *Trump v. Hawaii* included a preamble in which the President explained that some countries’ deficient information-sharing practices put the United States at risk.<sup>510</sup> The Proclamation further explained in detail why information sharing is important for national security and how the Department of Homeland Security evaluated foreign countries’ information-sharing practices.<sup>511</sup> The Proclamation tailored its restrictions based on the circumstances in each individual country<sup>512</sup> and provided certain exceptions.<sup>513</sup>

This time, the Supreme Court reversed the judgment enjoining the Proclamation.<sup>514</sup> The Court emphasized that the Proclamation included “extensive findings” supporting the President’s discretionary decision.<sup>515</sup> The Court thought it “questionable” whether the President had to explain

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501. Exec. Order No. 13,769 § 3(c), 82 Fed. Reg. 8977 (Jan. 27, 2017).

502. See *supra* note 382.

503. Exec. Order No. 13,769 §§1, 3(c), 82 Fed. Reg. 8977 (Jan. 27, 2017).

504. See, e.g., *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017) (per curiam).

505. Exec. Order No. 13,780 § 1(d), 82 Fed. Reg. 13,209 (Mar. 6, 2017).

506. *Id.* § 1(e), (h).

507. *Id.* § 1(f).

508. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554 (4th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017) (per curiam).

509. *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2088 (2017) (per curiam). The Court vacated the lower courts’ judgments as moot when the suspensions expired. *Trump v. Int’l Refugee Assistance Project*, 138 S. Ct. 353 (2017); *Trump v. Hawaii*, 138 S. Ct. 377 (2017).

510. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

511. *Id.* § 1.

512. *Id.* § 2.

513. *Id.* § 3.

514. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

515. *Id.* at 2408.

his determination “with sufficient detail to enable judicial review”<sup>516</sup> but found the President’s explanation to be sufficiently detailed and thorough nonetheless.<sup>517</sup> The Court limited its statutory inquiry to whether the President acted within the scope of his authority.<sup>518</sup> It declined the plaintiffs’ request to evaluate the persuasiveness of the President’s rationale, finding that approach “inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere.”<sup>519</sup> Instead, the Court was satisfied with its conclusion that “the Proclamation does not exceed any textual limit on the President’s authority.”<sup>520</sup> The challengers’ request for “the Court to probe the sincerity of the stated justifications for the policy by reference to extrinsic statements”<sup>521</sup> also fell flat, because the President “gave a ‘facially legitimate and bona fide’ reason for [his] action.”<sup>522</sup> Indeed, the President’s “stated objective” or “justification,” which the Court accepted at face value, was the focus of the Court’s Establishment Clause review and the key to the judgment upholding the order.<sup>523</sup>

### B. Next Time

Now imagine that either the Supreme Court or Congress had overruled *Franklin* before President Trump issued the travel bans. First, acknowledging that the Statutory President is an “agency” under the APA would have required President Trump to publish notice of and accept public comments on his proposed policy.<sup>524</sup> Seeking public input up front, including from agencies with relevant information and expertise, may have resulted in a more accurate and honed policy in the first instance.<sup>525</sup> A higher quality policy would have been more likely to accomplish Trump’s asserted national security goals. Avoiding the false starts also might have reduced public dissent simply by making the process more transparent and fair.<sup>526</sup>

Second, the APA would have required the President to consider the public comments.<sup>527</sup> Trump declared his intention to issue these orders

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516. *Id.* at 2409.

517. *Id.*

518. *See, e.g., id.* at 2415 (summarizing its analysis as holding that “[t]he Proclamation is squarely within the scope of Presidential authority under the INA”).

519. *Id.* at 2409.

520. *Id.* at 2410.

521. *Id.* at 2418.

522. *Id.* at 2419 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972)).

523. *Id.* at 2420–21, 2423.

524. *See* 5 U.S.C. § 553(b)–(c) (2018).

525. *See* Lynn E. Blais & Wendy E. Wagner, *Emerging Science, Adaptive Regulation, and the Problem of Rulemaking Ruts*, 86 TEX. L. REV. 1701, 1707 (2008).

526. *See* Knowles, *supra* note 266, at 894.

527. 5 U.S.C. § 553(c).



before the election,<sup>528</sup> so he likely saw the election as an endorsement of his policy. Yet, he did not win a majority of the popular vote,<sup>529</sup> and obviously there were far more issues at play in the election. Some genuine deliberation would have given the immigration policy some distance from raw politics and lent it a bit of legitimacy.<sup>530</sup>

Third, if the APA had been applicable, Trump likely would have given a more robust explanation in the first order instead of needing to go through two failed iterations before reaching a result that ultimately satisfied the Supreme Court.<sup>531</sup> The benefits of providing a better explanation would have merged with the benefits of providing public notice, an opportunity for public comment, and genuine consideration to make the initial order more accurate, effective, legitimate, and fair.

Fourth, if *Franklin* had been overturned, the administrative record in *Trump v. Hawaii* would have included documents from the President's office. Generally speaking, the administrative record should include any unprivileged material the decisionmaker considered in reaching a final decision.<sup>532</sup> We may never know what the record would have included in *Trump v. Hawaii*. We know what would not have been included: evidence that Trump followed the review process required by Kennedy's executive order before issuing the first travel ban. The APA would have revealed Trump's procedural failure. A complete administrative record also might have revealed whether Trump's stated justification for the order was genuine.

Lastly, by reviewing Trump's travel ban like any other decision of a statutory delegate, the Court would not have limited its inquiry to whether the President stated the requisite finding—that allowing people from certain country to enter the United States “would be detrimental to the interests of the United States.”<sup>533</sup> Rather, the Court also would have examined whether his finding was reasonable and supported by the record.<sup>534</sup>

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528. See, e.g., Patrick Healy & Michael Barbaro, *Donald Trump Calls for Barring Muslims from Entering U.S.*, N.Y. TIMES (Dec. 7, 2015, 4:36 PM), <https://www.nytimes.com/politics/first-draft/2015/12/07/don-ald-trump-calls-for-banning-muslims-from-entering-u-s/> [<https://perma.cc/7N5R-EZYG>].

529. Benjamin Kentish, *Donald Trump Has Lost Popular Vote by Greater Margin than Any U.S. President*, INDEPENDENT (Dec. 12, 2016, 6:32 PM), <https://www.independent.co.uk/news/world/americas/us-elections/donald-trump-lost-popular-vote-hillary-clinton-us-election-president-history-a7470116.html> [<https://perma.cc/85LV-MLTA>]; Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016, 5:34 AM), <https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html> [<https://perma.cc/6CUK-GEU7>].

530. See Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 329 (2013).

531. See *supra* text accompanying notes 362–366.

532. See *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2564, 2574 (2019); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989); Gavoov & Platt, *supra* note 290, at 25.

533. 8 U.S.C. § 1182(f) (2018); see also *Trump v. Hawaii*, 138 S. Ct. 2392, 2408 (2018).

534. See *supra* text accompanying notes 436–441, 466–468.

The Court might have scrutinized Trump's stated justification for the policy as well. In the recent case concerning the inclusion of a citizenship question on the decennial census, *Department of Commerce v. New York*, the Supreme Court reiterated that while courts generally do not inquire about a decisionmaker's "mental processes," where there is a "strong showing of bad faith or improper behavior," the court may order extra-record discovery.<sup>535</sup> There, the Court examined the available evidence and held that the Secretary's rationale for his decision did not match the record.<sup>536</sup> The Court insisted that agencies provide "genuine justifications for important decisions" to avoid turning judicial review into "an empty ritual."<sup>537</sup> If the Court had applied that rule in *Trump v. Hawaii*, it may have concluded that the explanation in the final travel ban was pretextual.

Of course, courts are particularly solicitous of decisions based on national security concerns. In *Trump v. Hawaii*, the Court declined to second-guess the authenticity of the President's justification for the travel ban—despite his repeated public statements indicating that it was motivated by animus toward Muslims<sup>538</sup>—because it implicated immigration and national security, areas in which the Court believes that it lacks institutional competence.<sup>539</sup> That solicitude conflicts with the plain language and history of the APA.<sup>540</sup> Congress made a deliberate decision in the APA to subject all agency action to the same standard of review.<sup>541</sup> It carved out exceptions related to national security: the APA does not apply to courts martial or "military authority exercised in the field in time of war,"<sup>542</sup> and military and foreign affairs functions are exempt from the rulemaking and adjudication provisions.<sup>543</sup> Where those exceptions do not apply, even decisions with national security implications should receive no more or less deference than any other agency decision.<sup>544</sup> In short, if *Franklin* had been overturned before President Trump took office, the travel ban would have been reviewed like any other agency order. Had it been, both the process and the outcome may have been very different.

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535. 139 S. Ct. at 2573–74 (quoting *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).

536. *Id.* at 2575.

537. *Id.* at 2575–76.

538. See 138 S. Ct. at 2417; *id.* at 2435–38 (Sotomayor, J., dissenting).

539. See *id.* at 2418–20.

540. See Kovacs, *Leveling*, *supra* note 182, at 585.

541. *Id.* at 590–91.

542. 5 U.S.C. §§ 551(1)(F)–(G), 701(b)(1) (F)–(G) (2018).

543. §§ 553(a)(1), 554(a)(4).

544. See Kovacs, *Leveling*, *supra* note 182.

## CONCLUSION

Presidents use statutorily delegated powers to make decisions that have vast implications for the public. They divert billions of dollars in federal funds; they move international trade markets; they bar people from entering the country. A single person making binding policy decisions unilaterally is the very definition of authoritarianism.<sup>545</sup>

This paper suggests one solution to this problem: overturn *Franklin v. Massachusetts* and treat the President like an “agency” under the APA. The Supreme Court could do this simply by adhering to the plain language of the APA. Reading the text to include the President as an “agency” finds support in the statutory history, it avoids constitutional concerns, and it advances the APA’s central values.

Stare decisis should not hinder the Supreme Court from overturning *Franklin*. Even the “super-strong” form of stare decisis applied in statutory cases is not absolute.<sup>546</sup> For one thing, the Court overrules statutory precedents “when there are constitutional doubts about the statute as interpreted.”<sup>547</sup> As explained above, exempting the Statutory President from the APA’s definition of “agency” raises serious constitutional concerns.<sup>548</sup> Furthermore, the Court has carved out exceptions to statutory stare decisis where its precedent reflects inadequate deliberation,<sup>549</sup> which certainly applies to *Franklin*.<sup>550</sup> In addition, the Supreme Court often has treated the APA like a common law statute.<sup>551</sup> Though I disagree with that approach,<sup>552</sup> it should leave the APA more open to reinterpretation.<sup>553</sup>

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545. David Little, *Law, Religion, and Human Rights: Skeptical Responses in the Early Twenty-First Century*, 31 J.L. & RELIG. 354, 356 (2016) (“Merriam-Webster, for example, defines *authoritarian* as ‘of, relating to, or favoring a concentration of power in a leader or an elite not constitutionally responsible to the people . . . .’”); Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 448 (2015) (“I take as a rough definition of authoritarianism that all decisions can potentially be made by a single decision maker, whose decisions are both formally and practically unregulated by law . . . .”); see also Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1678–79 (2015) (discussing “stealth authoritarianism,” which uses “the law to entrench the status quo, insulate the incumbents from meaningful democratic challenges, and pave the way for the creation of a dominant-party or one-party state”).

546. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1363 (1988); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989); Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1130 (2019).

547. Eskridge, *supra* note 546, at 1366.

548. See *supra* text accompanying notes 240–256.

549. Eskridge, *supra* note 546, at 1370–76.

550. See *supra* Part I.B.

551. Kovacs, *Pixelating*, *supra* note 209, at 38–42.

552. Kovacs, *Superstatute Theory*, *supra* note 13; Kovacs, *Progressive Textualism*, *supra* note 209.

553. Eskridge, *supra* note 546, at 1376–81; Kozel, *supra* note 546, at 1143.

Moreover, the justifications for statutory *stare decisis* do not fit *Franklin*. The Court applies *stare decisis* more strongly in statutory interpretation cases partly on the premise that Congress can override such interpretations<sup>554</sup>: “if Congress does not amend the statute to overrule the statutory precedent . . . it is presumed that Congress ‘approves’ of the interpretation.”<sup>555</sup> Additionally, “the Supreme Court’s refusal to revisit a statutory interpretation is a means of shifting policymaking responsibility back to Congress, where it belongs.”<sup>556</sup> As noted above, however, when the Court sides with the President, the prospect of a congressional reversal is remote.<sup>557</sup>

If the Court is not up to the task, Congress may overturn *Franklin* by amending the APA to clarify that the President is an “agency.” In this Article, I have presented the legal and normative arguments for that amendment. In recent decades, people on both sides of the aisle have objected to presidential overreach.<sup>558</sup> There should be bipartisan support for my proposal. At least, it is my hope that this paper spurs discussion of the Statutory President’s procedures and judicial review.

Admittedly, Congress overruling *Franklin*, which would entail overriding a likely presidential veto, seems like a long shot at this point in history. Some might agree with Jonathan Siegel, who opined that “the APA may well be too blunt an instrument to deal with particular concerns that apply to the President.”<sup>559</sup> Moreover, overturning *Franklin* in one fell swoop could subject the Statutory President to the Congressional Review Act<sup>560</sup> and the National Environmental Policy Act,<sup>561</sup> among others.<sup>562</sup> Alternatively, then, Congress could specify which of the APA’s provisions apply to the President. This latter approach would force Congress to balance

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554. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005); Kozel, *supra* note 546, at 1138; *see also id.* at 1138–40 (critiquing that rationale).

555. Eskridge, *supra* note 546, at 1366–67.

556. Barrett, *supra* note 554, at 317; *see also* Eskridge, *supra* note 546, at 1366–67.

557. *See supra* text accompanying notes 310–311.

558. Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43, 51 (2017) (“Republicans will continue to criticize Democratic presidents for crossing the line—as they vociferously did when Barack Obama was President—while Democrats will continue to criticize Republicans—as they did vociferously when George W. Bush was President”).

559. Siegel, *supra* note 43, at 1704.

560. 5 U.S.C. §§ 801(a)(1), 804(3) (2018). What is commonly known as the “Congressional Review Act,” *see* Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 188 (2003), was part of the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868–874.

561. National Environmental Policy Act of 1969, Pub. L. No. 91-190 § 102, 83 Stat. 852, 853 (1970), *codified at* 42 U.S.C. § 4332 (2018).

562. *See, e.g.*, Connected Government Act, 44 U.S.C. § 3559 (2018); An Act to amend the Small Business Act and the Small Business Investment Act of 1958, 15 U.S.C. § 637(c) (2018); Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11317 (2018).

the benefits and burdens of the APA's various provisions in this context, and in the course of that analysis, perhaps consider other long-overdue amendments.<sup>563</sup>

Another alternative would be for Congress to dial back its practice of delegating final decisionmaking authority to the President. Any such delegation should be conditioned on procedural requirements and adequate judicial review. If the President is not subject to those basic constraints, the President should not be delegated final decisionmaking authority. Regardless of how the task is accomplished, the Statutory President must be reined in if we are to slow our gallop towards authoritarianism.

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563. See Morrison, *supra* note 44, at 22; see also Walker, *supra* note 374 (proposing amendments to the APA).