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## ANOTHER WORD ON THE PRESIDENT'S STATUTORY AUTHORITY OVER AGENCY ACTION

Nina A. Mendelson\*

By delegating to the “Secretary” or the “Administrator,” has Congress indicated an intent regarding presidential control of executive branch agencies? This seemingly simple interpretive question has prompted significant scholarly debate.<sup>1</sup> In particular, if the statute names an executive branch agency head as actor, can the President be understood to possess so-called “directive” authority?

“Directive” authority might be understood to cover the following situation: the President tells the agency head, “You have prepared materials indicating that options A, B, and C each satisfies statutory constraints and could be considered justified on the agency record. The Administration’s choice will be Option A.” The President could, of course, offer a reason—perhaps Option A is the least paternalistic, most protective, or most innovation-stimulating of the three. If the option preferred by the President otherwise complies with substantive statutory requirements on the record prepared by the agency,<sup>2</sup> the question is whether the statutory reference to “Administrator” or “Secretary” should be understood as a limit on the President’s authority to direct the executive branch agency official to act in a particular way.

A number of scholars have argued that statutory delegation to an executive branch agency official means that “the President cannot simply

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1. I take no position on whether the Constitution might be read to compel presidential decisional authority. See generally Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power To Execute the Laws*, 104 YALE L.J. 541, 549–50 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2–3 (1994); Peter L. Strauss, *Foreword: Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 702–03 (2007).

2. Beyond “directive authority” is the case in which the President has a rule and supporting record developed, prepared, and written within the White House and then orders the agency, without more, to publish it. Although an agency official might have executed the Federal Register notice, such action would appear to leave the agency no meaningful role whatsoever. Whatever Congress’ specific intent, this would be hard to square with the language of a simple delegation.

command or direct an agency head to issue a regulation.”<sup>3</sup> These same scholars generally concede that the President may oversee and substantially influence agency decisions, such as by prompting agencies to prioritize particular problems or to coordinate with and take account of another agency’s concerns. Their position that more aggressive direction is precluded by statute has practical implications that are not fully clear. It changes little, for example, about the President’s recourse against a recalcitrant agency official. Her primary recourse—whether the statute says “Administrator,” “Secretary,” or “President”—remains removal from office,<sup>4</sup> and she may have other tools as well.<sup>5</sup> Outside the area of national security and foreign relations,<sup>6</sup> and within the arena of domestic policy, the President is highly unlikely to, say, issue a rule in lieu of the agency head even if the statute says “President.”<sup>7</sup>

So what difference does the answer to the question make? If the President generally possesses directive authority over executive agency officials even when the statute’s delegation of authority is to the “Administrator” or the “Secretary,” it may reduce the need to reach the arguments of unitary executive theorists that the Constitution *requires* such authority.<sup>8</sup>

Beyond this, other commentators have argued that the primary difference it makes is in attitude. If the President’s role is improperly mischaracterized as the “Decider,” Professor Peter Strauss’s term, an agency official might be prompted to discount the agency’s own view of the proper decision and, within statutory bounds, feel committed to follow the

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3. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 ADMIN. L. REV. 1, 7 (2007); accord Strauss, *supra* note 1, at 759 (“If [statutory] text chooses between President as overseer of the resulting assemblage, and President as necessarily entitled ‘decider,’ the implicit message is that of oversight, not decision.”).

4. See Sargentich, *supra* note 3, at 7; Kevin M. Stack, *The President’s Statutory Powers To Administer the Laws*, 106 COLUM. L. REV. 263, 293–96 (2006); Strauss, *supra* note 1, at 716. Professor Kevin Stack’s position amplified one also noted by Professor Robert V. Percival. See Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1008 (2001) (noting express presidential authority over agency decisions in some statutes but not others).

5. See, e.g., Sargentich, *supra* note 3, at 8 (noting importance of “stay[ing] on the good side of White House officials”).

6. See *infra* notes 79–82 and accompanying text.

7. See *infra* notes 38–46 and accompanying text (bureaucratic obstacles likely to preclude President from signing Federal Register notices even if statute delegates authority to President; noting President has only rarely signed such a notice since 1981).

8. Stack has pointed out that if a simple delegation is understood to limit presidential directive authority, unitary executive advocates must apply the constitutional avoidance doctrine to argue that the statutes nonetheless permit presidential direction or else argue that the statutes are unconstitutional. Stack, *supra* note 3, at 299 (“This conclusion forces proponents of a strongly unitary executive to invoke constitutional avoidance principles.”). Stack also argues that the answer to the question also has implications for the applicability of the *Chevron* doctrine and the validity of executive orders, issues beyond the scope of this paper in view of my conclusion that simple delegations generally communicate no particular intent to limit presidential control. See Stack, *supra* note 4, at 307–14.

President's instructions.<sup>9</sup> Two consequences that are potentially undesirable from a policy perspective might follow: first, an agency official might perceive that she is less able to resist an incorrect—or worse—presidential viewpoint, even if she sees it as a poor exercise of discretion.<sup>10</sup> Second, agency accountability for decision making might be reduced if the official is able to say, “The President made me do it.”<sup>11</sup>

Then-professor, now Justice, Elena Kagan argued in 2001 that a reasonable interpretive principle is to understand a delegation to an executive branch agency as Congress leaving open, rather than foreclosing, the possibility of presidential directive authority.<sup>12</sup> She made this argument in view of the backdrop of removal authority, the history of presidential oversight of agency regulatory activity, and other presidential actions. Congress, she argued, should be understood as delegating authority against the backdrop of presidential control. She further argued that the “very subtlety of the line between directive authority and other tools of presidential control,” such as influence, “provides reason to doubt any congressional intent to disaggregate them.”<sup>13</sup> She suggested that the most likely explanation is that Congress has no specific intent on the matter. She conceded, however, that her argument could be defeated if “Congress sometimes stipulated that a delegation of power to an agency official was subject to the ultimate control of the President.”<sup>14</sup>

Professor Kevin Stack took up Kagan's invitation and, in 2006, in a thorough and meticulous analysis, presented a variety of such so-called mixed delegations. He reasoned that Congress's use of delegations only to the President, including to act “through” a specified agency, or to agency heads subject to explicit presidential approval strongly implied that statutory delegations just to executive branch officials—so-called simple delegations—were meant to curb the President's authority.<sup>15</sup>

In this short symposium contribution, I attempt first to add some further evidence on the interpretive question. That evidence weighs strongly, in my view, in favor of Kagan's conclusion that the terminology does not communicate any particular congressional intent regarding presidential directive authority. Assessed in context, the “whole code” textual analysis presented by Stack does not justify the conclusion that Congress, by

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9. Strauss, *supra* note 1, at 704.

10. *See id.* at 736; Stack, *supra* note 4, at 296.

11. Sargentich, *supra* note 3, at 9.

12. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2327–28 (2001). Stack discusses the extent to which Kagan's position was anticipated in the 1920s by James Hart. *See* Stack, *supra* note 4, at 294 (“Hart contended that these delegations do not support the inference that the President lacked authority to bind an agency's discretion when the delegation ran only to the agency.” (citing JAMES HART, THE ORDINANCE MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES 195 n.30 (1925))).

13. *Id.* at 2328.

14. *Id.* at 2329.

15. Stack, *supra* note 4, at 277 (“[I]n view of these express provisions of presidential control in delegations to executive officials, delegations to executive officials alone—‘simple delegations’—should not be read to grant directive authority to the President.”).

delegating to an executive branch official, meant to limit presidential control. Independent agencies excluded, interpreting the terms of simple and presidential delegations to speak to directive authority fails, in general, to make sense of the various statutes. Absent any special legislative context, the most reasonable interpretation of these words is that neither a presidential delegation nor a simple delegation to an executive agency speaks to presidential directive authority. Instead, Congress's intent in delegating to the President appears to be simply to convey the additional power to choose *which* executive branch agency official will be primarily responsible for carrying out a statutory delegation.<sup>16</sup>

Moreover, even if simple delegations could be interpreted to limit presidential directive authority, it is unclear that the interpretation would have the claimed beneficial effect of increasing the resistance of individual agency officials to White House pressure.

Policy matters and the legitimacy of White House control weigh heavily in Kagan's arguments as well as in the arguments of Robert Percival, Stack, Strauss, and Thomas Sargentich. I conclude with a few observations on the normative debate on presidential control. I also suggest that we put aside the interpretive arguments and focus instead on greater disclosure of the content of that control. Disclosure may be particularly helpful not only in helping us resolve the legitimacy of presidential direction, but also in informing clearer legislation.

#### I. DO "SIMPLE DELEGATIONS" IMPLY A STATUTORY LIMIT ON PRESIDENTIAL DIRECTIVE AUTHORITY?

At the outset, I put aside delegations to independent agencies, which, with their typical limits on presidential removal of agency officials, are widely understood as communicating Congress's intent to minimize presidential directive authority.

In the setting of executive branch agency programs, the best reading of the words "President" and "Administrator" is that they reveal no generalized congressional intent regarding presidential control. Instead, the use of the term "President" is best understood as a general matter to permit the President to assign primary implementation responsibility to an executive branch agency of her choice.<sup>17</sup> Correspondingly, the use of the term "Administrator" or "Secretary" is best understood as limiting the President's authority to assign implementation responsibility to an agency other than that named in the statute, rather than addressing the extent of directive authority. First, as Kagan argued, in the domestic policy arena,

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16. See Kagan, *supra* note 12, at 2329 (the interpretation "enables the President to choose who will function as the initial (and, in practice, usually the ultimate) decisionmaker").

17. *Id.* As discussed below, the special context of some statutes may suggest that Congress occasionally does envision greater direct presidential supervision. See, e.g., *infra* notes 71, 79 and accompanying text (on Computer Security Act of 1987, later amended by E-Government Act of 2002).

Congress delegates authority to executive branch agencies against a well-known backdrop of presidential oversight of and involvement in executive agency decisions, particularly agency regulatory decisions.<sup>18</sup> That weighs against an interpretation of “Administrator” or “Secretary” as limiting presidential directive authority.

Prominent in that backdrop, of course, is presidential power to remove executive branch officials. As the U.S. Supreme Court explained in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,<sup>19</sup> the Constitution’s notion of “executive power” has long been understood to include the traditional power to remove, unless expressly limited by statute.<sup>20</sup> Since 1981, moreover, the President has publicly and formally asserted regulatory review clearance authority with respect to significant executive branch agency rules. Agencies are not to publish significant proposed or final rules without the explicit or implicit approval of the Office of Management and Budget’s Office of Information and Regulatory Affairs.<sup>21</sup> Even prior to 1981, Presidents were known to “jawbone” the agencies.<sup>22</sup> Finally, it is widely known that executive agency budget requests, legislative positions, and testimony before Congress are all systematically coordinated and “cleared” through White House offices so that a unified executive branch position can be presented.<sup>23</sup>

Even with a delegation straight to the “Administrator” or the “Secretary,” then, Congress is likely to expect potentially substantial presidential oversight of a wide range of executive branch agency actions.<sup>24</sup> Indeed, the scholars arguing against directive authority concede that the statutes should be understood to permit substantial presidential influence over executive branch agency officials.<sup>25</sup> That influence, of course, can facilitate

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18. Kagan, *supra* note 12, at 2328.

19. 130 S. Ct. 3138 (2010).

20. *Id.* at 3151–52 (discussing *Myers v. United States*, 272 U.S. 52, 117, 164 (1926)).

21. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994); Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *revoked by* Exec. Order No. 12,866, 3 C.F.R. at 638.

22. See generally Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980).

23. See, e.g., Percival, *supra* note 4, at 983–84.

24. This conclusion would be different if the agency action were a formal adjudication or rulemaking subject to ex parte contact restrictions under the Administrative Procedure Act or authorizing statute. See, e.g., Administrative Procedure Act, 5 U.S.C. § 557(d) (2006); *Portland Audubon Soc’y v. Endangered Species Comm.*, 984 F.2d 1534, 1545 (9th Cir. 1993) (prohibition on ex parte contacts applied to President when formal adjudication decision vested in other agency officials).

25. See Sargentich, *supra* note 3, at 19 (“The key distinction under the traditional view in any event is the one between presidential influence or persuasion on the one hand, and presidential command and direction on the other.”); Stack, *supra* note 4, at 294 (“All of this authority means that the President is likely to be able to implement his policy through executive branch agencies . . . .”); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986); see also Proposed Executive Order Entitled “Federal Regulation,” 5 Op. O.L.C. 59, 61 (1981) (“We believe that an inquiry into congressional intent in enacting statutes delegating rulemaking authority will usually support the legality of presidential supervision of rulemaking by executive agencies.”).

interagency coordination and broad policy direction by an electorally accountable official. There seems little dispute that a simple statutory delegation permits the President to influence—even direct—an agency to address one problem over another—to prioritize air pollution control over hazardous waste cleanup, say— or to require executive branch agencies not to take conflicting approaches with one another. At the other end of the continuum, there seems little dispute that the language of the simple delegation ought to be understood to bar the President from, say, signing a Federal Register notice in lieu of the agency official or perhaps even from having White House officials conduct an entire rulemaking procedure from start to finish, having the agency only publish the rule. That would leave the agency with a purely formal role.

But does a simple delegation convey any congressional intent to limit the President from directing an agency official to act or to make a choice among available options? Beyond the backdrop of removal authority and presidential involvement in agency decision making, if the choice of the word “Administrator” or “Secretary” were meant to convey a limit on presidential direction, one also might expect to see some indication in the legislative history accompanying statutes making such delegations. Although legislative history accompanying delegations to independent agencies does sometimes make mention of insulated decision making—or at least terms the agencies “independent”—the legislative history of statutory delegations to executive branch agency heads does not seem to do more than mention that the delegation is to the official in question. For example, the Clean Air Act’s<sup>26</sup> delegation to the Environmental Protection Agency (EPA) to set national ambient air quality standards was accompanied by a comment in the legislative history mentioning only that delegation—there is no mention of insulation or independence.<sup>27</sup> Similarly, the legislative history of the Occupational Safety and Health Act of 1970,<sup>28</sup> which delegates authority to the Secretary of Labor, does discuss separation of powers concerns and insulation, but only with respect to the advisability of combining enforcement and standard-setting in the same agency.<sup>29</sup> It appears to contain no discussion of whether the Secretary should be insulated from presidential oversight, but discusses only whether it is appropriate to insulate enforcement within the agency.<sup>30</sup> This is not to say

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26. 42 U.S.C. §§ 7401–7671 (2006).

27. See H.R. REP. NO. 91-1146, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5356, 5356 (“The Secretary of [the Department of Health, Education, and Welfare] will be authorized and directed to establish nationwide ambient air quality standards.”). The President is not mentioned in the report.

28. Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 29 U.S.C.).

29. See, e.g., 29 U.S.C. § 655 (authorizing Secretary to set standards); *id.* § 657 (authorizing Secretary to inspect and investigate workplaces for compliance with standards).

30. See S. REP. NO. 91-1282, at 8 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5177, 5184–85 (“Rather than dividing responsibility by creating yet another agency, the committee believes that a sounder program will result if responsibility for the formulation of rules is assigned to the same administrator who [is] also responsible for their enforcement and for

that the apparent absence of legislative history is dispositive,<sup>31</sup> but it is suggestive. By contrast, the new Consumer Financial Protection Bureau created in the Dodd-Frank legislation,<sup>32</sup> headed by an official who is removable only for cause, is specifically described as an “independent bureau” in its legislative history.<sup>33</sup>

In short, the backdrop and legislative context of simple delegations, compared with independent agency delegations, do not support the interpretation that simple delegations, like independent agency delegations, are meant to insulate the agency from the exercise of presidential directive authority.

Further, if a delegation straight to an executive branch agency official were meant generally by Congress to insulate the official from presidential direction, a statutory delegation to the President should mean Congress intends correspondingly *greater* presidential supervisory or directive authority. That reading must be rejected. As a general matter, the term “President” generally cannot reasonably be understood to represent any greater expectation of presidential involvement than with a simple delegation. Correspondingly, there cannot be an implication that the term “Secretary” or “Administrator,” at least within the executive branch, means less.

Consider first the exponential growth in the size of the administrative state.<sup>34</sup> From this alone, one could infer that a reasonable Congress would expect the President to make few, if any, decisions personally, undermining any inference of expected presidential direction from repeated uses of the term “President.”

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seeing that they are workable and effective in their day-to-day application, thus permitting cohesive administration of a total program. In the committee’s view, the question of separation of power is not so much one of whether the Secretary should be separated from the power to set standards, but whether he should be separated from the power to administer an integral program, and from the power of the Congress and the public to hold him accountable for the overall implementation of that program.”)

31. *Cf.* *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (criticizing the assumption that “dogs will bark when something important is happening”).

32. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of U.S.C.).

33. *See* H.R. REP. NO. 111-517, at 599–600 (2010) (Conf. Rep.), *reprinted in* 2010 U.S.C.C.A.N. 722, 730–31 (describing director as removable only for cause, and the bureau as an “independent bureau”); *see also* H.R. REP. NO. 111-703, at 21 (2011) (describing Bureau as “[l]ed by an independent director,” with “[i]ndependent [b]udget” and “[i]ndependent [r]ule [w]riting” powers).

34. STEPHEN G. BREYER, RICHARD STEWART, CASS SUNSTEIN & MATHEW L. SPITZER, *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 1* (5th ed. 2002) (“Much of modern life is a product, in large part, of the activities of administrative agencies. The range of administrative government is remarkably wide . . . .”); 1 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* § 1.3, at 8 (5th ed. 2010) (“The size and scope of federal administrative activity has increased during every period in the nation’s history.”); Meredith Abernathy, *Running on Empty: Will Exxon Mobil Cause a Breakdown for Chevron and the Administrative State?*, 64 WASH. & LEE L. REV. 583, 592 (2007) (noting “rapid proliferation in both the number and variety of agencies”).

Beyond this, Congress explicitly recognized the limits on presidential capacity by creating a regime that gives the President complete autonomy to choose which decisions she will make when he receives a delegation of statutory authority. In 1951, Congress enacted the Presidential Subdelegation Act of 1950,<sup>35</sup> partly in response to complaints from President Harry S. Truman that the burden of individual approvals and other paperwork was occupying “3 hours every night.”<sup>36</sup> That Act permits the President to redelegate to an executive branch agency official, through executive order, any power she has received under statute, leaving her the unfettered choice either to reserve formal approval authority or to condition that delegation on such “terms, conditions, and limitations as the President may deem advisable.”<sup>37</sup> In short, through the Presidential Subdelegation Act, Congress formally repudiated any understanding of the term “President” as conveying a requirement—or even an expectation—of personal Presidential direction or decision making.

Moreover, in actual practice and at least in the domestic policy setting, the President nearly always formally and publicly redelegates these statutory authorities. Numerous presidential executive orders and memoranda delegate statutory functions to individual executive branch officials.<sup>38</sup> Occasionally these documents are used to revise and reassign earlier delegations, though I have yet to locate an outright revocation of such a delegation.<sup>39</sup> Although executive orders sometimes require agency

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35. Pub. L. No. 81-673, 64 Stat. 419 (codified at 3 U.S.C. §§ 301–303 (2006)).

36. See Verkuil, *supra* note 22, at 966 (quoting S. REP. NO. 81-1867, at 1 (1950), reprinted in 1950 U.S.C.C.A.N. 2931, 2931); see also Percival, *supra* note 4, at 1007–08.

37. See 3 U.S.C. § 301 (“The President . . . is authorized to designate and empower the head of any department or agency in the executive branch . . . to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President . . .”). Specific authorities to designate—though they are clearly not necessary after the Presidential Subdelegation Act—appear in other statutes as well. See, e.g., Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 3107(d), 116 Stat. 134, 296 (codified with some differences in language at 7 U.S.C. § 1736-1).

38. For a few of the numerous examples, see, for example, Exec. Order No. 13,419, 3 C.F.R. 256 (2007) (delegating authorities to Director of the Office of Science and Technology Policy, in consultation with NASA and the Departments of Defense and Transportation); George W. Bush, Memorandum for the Director of the Office of Personnel Management (July 8, 2003), 68 Fed. Reg. 45,155 (July 31, 2003) (codified at 5 C.F.R. pt. 724 (2009)); George W. Bush, Memorandum for the Secretary of Agriculture (Mar. 11, 2003), 68 Fed. Reg. 12,569 (Mar. 17, 2003) (delegating authorities to Secretary of Agriculture); William J. Clinton, Memorandum for the Administrator of the Environmental Protection Agency (Aug. 19, 1993), 58 Fed. Reg. 52,397 (Oct. 8, 1993); Exec. Order No. 12,580, 3 C.F.R. 193 (1988) (delegating presidential authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to agencies including the EPA, Coast Guard, and the Departments of Interior, Commerce, and Health and Human Services (HHS)).

39. See, e.g., Exec. Order No. 13,308, 3 C.F.R. 239 (2004); Exec. Order No. 13,286, 3 C.F.R. 166 (2004).

officials receiving a delegation to consult with other agencies,<sup>40</sup> I also have yet to locate a delegation of authority under a domestic statute where the President has elected to retain any approval authority over presidential authority delegated to an agency.

The Robert T. Stafford Disaster Relief and Emergency Assistance Act,<sup>41</sup> for example, delegates a wide range of authorities to the President, including the authority not only to declare a disaster but to enter into contracts, give warnings, distribute food vouchers, arrange for mass feedings, and provide transportation to individuals dislocated by disaster.<sup>42</sup> Presidents have delegated the overwhelming majority of Stafford Act authorities among several executive branch agencies,<sup>43</sup> retaining only the authority to declare the existence of a national disaster.<sup>44</sup> The President has retained no approval authority over the rest of the decisions delegated to agency officials. And the retention of the disaster-declaring authority seems unusual. In general, presidents do not, for example, personally promulgate rules. (Electronic searching of the Federal Register since January 1981 has identified only two issues where rules seem to be signed or approved by sitting Presidents: the procedures for requesting a presidential pardon and the tolls charged on the Panama Canal.<sup>45</sup>) In the

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40. *See, e.g.*, Exec. Order No. 12,777, sec. 1, 3 C.F.R. 351, 352–53 (1992) (delegating Oil Pollution Act authorities to EPA and the Departments of Interior, Commerce, and Transportation, including some delegations based on location of spill); George W. Bush, Memorandum for the Secretary of Agriculture (Mar. 11, 2003), 68 Fed. Reg. 12,569 (Mar. 17, 2003) (requiring Secretary of Agriculture to consult with Food Policy Assistance Council and other heads of federal departments and agencies).

41. 42 U.S.C. §§ 5121–5207.

42. *See generally id.*

43. Most delegations are now to the Department of Homeland Security; past delegations have named Federal Emergency Management Agency (FEMA), the U.S. Department of Agriculture (USDA), and the Department of Defense (DOD). *See* Exec. Order No. 13,286, 3 C.F.R. 166 (2004); Exec. Order No. 12,673, 3 C.F.R. 214 (1990); Exec. Order No. 12,148, 3 C.F.R. 412 (1980) (superseded 1994). Over time, a substantial number of functions originally distributed among agencies have become consolidated in FEMA.

44. *See* Exec. Order No. 12,673, 3 C.F.R. 214 (1990).

45. In January, 2011, I performed the following Westlaw search in the Federal Register database: ca(“final rule” “rules and regulations”) su(“final rule” “rules and regulations”) pr(“rules and regulations” “final rule”) & (((george /3 bush) (william /3 clinton) (barack /3 obama) (ronald /3 reagan)) w/15 (signed dated approved issued)). That database covers all Federal Register publications beginning in January, 1981. The search identified 120 relevant documents, each of which I personally reviewed. Of those documents, the President executed rules regarding presidential pardon applications. *See* Department of Justice, Office of the Pardon Attorney, Rules Governing Petitions for Executive Clemency, Victim Notification and Comment, 65 Fed. Reg. 58,223 (Sept. 28, 2000) (codified as amended at 28 C.F.R. § 1.6 (2010)) (expressly approved by President Clinton); Department of Justice, Office of the Pardon Attorney, Rules Governing Petitions for Executive Clemency, Capital Cases, 65 Fed. Reg. 48,379 (Aug. 8, 2000) (codified as amended at 28 C.F.R. § 1.10 (2010)) (expressly approved by President Clinton); Department of Justice, Office of the Pardon Attorney, Rules Governing Petitions for Executive Clemency, 58 Fed. Reg. 53,658 (Oct. 18, 1993) (codified at 28 C.F.R. pt. 1 (2010)) (expressly approved by President Clinton). Besides the pardon rules, the only others appeared to relate to tolls on the Panama Canal. *See* The President, Panama Canal Commission, Tolls for Use of Canal and Rules for Measurement of Vessels, 59 Fed. Reg. 43,254 (Aug. 22, 1994) (signed by President

domestic policy setting, the very rare provision that *precludes* the President from delegating a determination to the executive branch agencies confirms the congressional expectation that agencies, rather than the President, will be primarily responsible for statutory implementation, including the issuance of rules, even when the statute says “President.”<sup>46</sup>

In short, the Presidential Subdelegation Act, as well as the sheer size of the administrative state, the practice of presidential delegation of statutory authorities without reservation into the agencies, and the rarity of direct presidential rulemaking, all tend to negate any conclusion that Congress’s use of the term “President” generally means that the President is obligated, or even expected, to formally act or decide under the statute. The Presidential Subdelegation Act communicates Congress’s understanding that, notwithstanding its use of the word “President” in authorizing statutes, agencies could properly implement the statutes with no presidential involvement whatsoever. Instead, it is simply the President’s choice how much to supervise, direct, or approve.

Given this pattern of statutory enactments, as well as of legislative context, delegation to the “President” in the domestic setting would be better understood not as communicating an intent regarding presidential supervision or direction, but instead as a first step to the powers ultimately arriving in an executive agency, the head of which is, of course, removable at the President’s will. That agency would simply be selected by the President rather than by Congress. As Kagan argued, a delegation straight to an executive branch agency, then, simply amounts to a limitation on the President’s ability to assign the task elsewhere.<sup>47</sup>

This understanding of congressional intent also avoids a significant difficulty regarding the application of the Administrative Procedures Act (APA). If the use of the term “President” were meant to convey a

Clinton); The President, Panama Canal Commission, Tolls for Use of Canal, 57 Fed. Reg. 37,066 (Aug. 17, 1992) (signed by President George H.W. Bush); The President, Panama Canal Commission, Tolls for Use of Canal and Rules for Measurement of Vessels, 54 Fed. Reg. 35,148 (Aug. 23, 1989) (signed by President George H.W. Bush).

I also used the following search in the Federal Register database to identify rules whose source might be the Executive Office of the President: ca(“final rule” “rules and regulations”) su(“final rule” “rules and regulations”) pr(“rules and regulations” “final rule”) /10 “executive office.” The search identified a few rules executed either by officials of agencies within the Executive Office of the President (EOP): the Council on Environmental Quality, the Office of Management Budget, or the U.S. Trade Representative. The search uncovered two rules issued directly by the EOP: one on standards of conduct for employees of the executive office of the President, *see* Executive Office of the President, Repeal of Standards of Conduct for Employees of the Executive Office of the President, 64 Fed. Reg. 12,881 (Mar. 16, 1999) (codified at 3 C.F.R. pt. 100 (2010)), and one on equal employment opportunity, *see* Enforcement of Nondiscrimination on the Basis of Handicap in Federally Conducted Programs, 53 Fed. Reg. 25,872 (July 8, 1988) (codified as amended in scattered sections of C.F.R.). Neither was executed by the President.

46. *See, e.g.*, 42 U.S.C. § 7410(f) (permitting President to suspend certain air quality regulations in the event of a national or regional emergency and providing that “[s]uch determination shall not be delegable by the President to any other person”).

47. *See* Kagan, *supra* note 12, at 2329.

congressional expectation that the President would exercise directive or decisional authority, it might raise concerns that a large number of such decisions also should be understood as insulated from APA review under the doctrine of *Franklin v. Massachusetts*.<sup>48</sup> In *Franklin*, the Supreme Court held that the President was not an agency within the meaning of the APA and that presidential decisions were thus immune from statutory review under the APA.<sup>49</sup> Instead, we can infer that—consistent with maintaining the widespread availability of APA review—Congress's expectation and intent generally is that *agencies*, subject to the APA, will exercise all these powers, whether the delegation is simple or to the President.<sup>50</sup>

It might also be argued, however, that even if Congress contemplated that, generally, the President would not personally implement or direct the particular statutory authorities, the reference to the “President” could still indicate an authorization, if not an expectation, for behind-the-scenes direction of an agency's decision. By delegating straight to an agency official, then, we could understand Congress as refusing the President such directive authority.

Since “President” cannot fairly be read as a generalized congressional expectation of greater presidential control, its omission in a simple delegation is weak support for reading that language as congressional intent to limit presidential control. In addition, such an interpretation does not make sense of some well-known statutory delegations. Those delegations are not consistent with understanding the term “President” to authorize greater presidential direction and the term “Administrator” or “Secretary” to limit that power.<sup>51</sup>

Consider first the Comprehensive Environmental Response, Compensation, and Liability Act<sup>52</sup> (CERCLA, or Superfund). That statute delegates most decisions to the President. Delegations under CERCLA to

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48. 505 U.S. 788 (1992).

49. *Id.* at 800–01 (President not an “agency” for APA purposes). Stack has discussed possible nonstatutory forms of review of the President's exercise of statutory authorities, even in the absence of APA review. See Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1169, 1194 (2009) (“*Franklin* [*v. Massachusetts*, 505 U.S. 788 (1992)] did not eliminate review of the President's compliance with statute outside the APA.”).

50. See Kagan, *supra* note 12, at 2351 (discussing *Franklin*) (“When the challenge is to an action delegated to an agency head but directed by the President . . . the review provisions usually applicable to that agency's action should govern.”). Particular statutory contexts might suggest that Congress specifically intended the President to be personally involved, and some of those contexts are discussed below. The point here, however, is that a text's reference to the “President” alone would not convey an intent to insulate the decision from APA review. See also Strauss, *supra* note 1, at 713 (citing EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957*, at 80 (4th rev. ed. 1957)) (discussing Corwin's analysis of the APA issue).

51. The exception here would be that in a delegation to the “President,” the President would have power to revoke or reassign the delegation; I have yet to locate an outright revocation, though Presidents do sometimes reassign delegations to other agencies.

52. 42 U.S.C. §§ 9601–9675 (2006).

the President include the authority to devise the so-called National Contingency Plan—a plan for responding to releases of hazardous substances into the environment.<sup>53</sup> Presidential delegations also include the power to investigate and to undertake response actions to address hazardous waste contamination *at individual sites*.<sup>54</sup> Congress's expectation in delegating to the President in CERCLA could not possibly have been that the President would be supervising individual site cleanup decisions—or responding to individual cases of hazardous waste contamination—at the thousands of contaminated sites across the country. Such decision making would simply be infeasible. Indeed, in the executive orders delegating CERCLA authorities, the President has reserved no express approval or review authority over any CERCLA decisions, outside whatever influence might be exercised through the regulatory review process for setting overall cleanup standards.

Nor would it be reasonable to draw any inference that Congress specifically intended *greater* presidential supervision over individual site cleanup decisions compared with certain other decisions allocated to agencies. Take first the Clean Air Act. That statute delegates most powers directly to the Administrator of the EPA, including the setting of national ambient air quality standards and numerous air emissions limitations.<sup>55</sup> That Act was most recently extensively revised in 1990, well after the formalization and institutionalization of regulatory review.<sup>56</sup> The EPA has set and revised national ambient air quality standards for only six criteria air pollutants, and compliance with these standards, if set with any degree of stringency, can be extremely costly. These are the sort of infrequent and high impact decisions a President could feasibly monitor. Under the current regulatory review executive order, a national ambient air quality standard would clearly qualify as an “economically significant rule” subject to Office of Management and Budget/Office of Information and Regulatory Affairs (OMB/OIRA) review, and White House influence in such decisions has been reported prominently.<sup>57</sup> Even if Congress did not desire presidential supervision of air quality standard setting, it is not reasonable to infer that Congress must have intended *greater* presidential direction of

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53. *Id.* § 9605(a) (“[T]he President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances . . .”).

54. *See, e.g., id.* § 9604(a)(1) (“[T]he president is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time . . .”).

55. *See, e.g., id.* § 7408 (delegation to Administrator to set national ambient air quality standards); *id.* § 7521 (delegation to Administrator to set new car emissions standards).

56. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 219, 104 Stat. 2399, 2492–2500 (codified as amended at 42 U.S.C. § 7545).

57. *E.g.,* John H. Cushman, Jr., *Top E.P.A. Official Not Backing Down on Air Standards*, N.Y. TIMES, June 1, 1997, at A1 (describing White House review of national ambient air quality for ozone and fine chemical particles); Editorial, *Decision Time on Clean Air*, N.Y. TIMES, June 5, 1997, at A26 (describing regulatory process as EPA “propos[ing] to the White House” standards for air pollution).

individual site cleanup decisions compared with the issuance of national ambient air quality standards.

Go one step further. The Resource Conservation and Recovery Act of 1976 (RCRA)<sup>58</sup> also addresses individual site contamination cleanup decisions, those made at existing hazardous waste disposal facilities. These cleanups can closely resemble CERCLA cleanups. Yet the statute delegates control over these cleanup decisions not to the President, as with CERCLA, but to the *EPA Administrator*.<sup>59</sup> Under both RCRA and CERCLA, literally thousands of contaminated sites are involved.<sup>60</sup> Differences in expected presidential involvement could not possibly explain why Congress would delegate authority over cleanups to the “President” in numerous sections of CERCLA while delegating similar authority to the Administrator in RCRA.<sup>61</sup>

And one further example: the Stafford Act delegates most authorities to the President, including the authority to distribute food vouchers, arrange for mass feedings, and provide transportation to individuals dislocated by disaster.<sup>62</sup> Compare that to the Supplemental Nutrition Assistance Program, which delegates the authority to “formulate and administer” a food stamp program to the Secretary of Agriculture, so that “eligible households . . . shall be provided an opportunity to obtain a more nutritious diet.”<sup>63</sup> It is hard to articulate a plausible reason why Congress would want more direct presidential supervision of the distribution of food vouchers in the disaster setting and less over the program to distribute assistance under the Supplemental Nutrition Assistance Program. In short, in the domestic policy setting, understanding “Administrator” or “Secretary” as more insulating from presidential direction compared with delegations to the

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58. 42 U.S.C. §§ 6901–6987.

59. *See, e.g., id.* § 6924(u) (providing that Administrator shall require “corrective action for all releases of hazardous waste” from permitted treatment, storage, or disposal facility, “regardless of the time at which waste was placed in such unit”).

60. *See, e.g.,* U.S. EPA, RCRA ORIENTATION MANUAL, at III-123 (2008), available at <http://www.epa.gov/osw/inforesources/pubs/orientat/rom.pdf> (“Approximately 3,800 sites are undergoing corrective action, three times the number of sites found on the Superfund National Priorities List . . .”); *id.* at VI-9 to -14 (chapter section entitled “CERCLA: The Hazardous Waste Cleanup Program”); U.S. Environmental Protection Agency, Superfund, Basic Information, <http://www.epa.gov/superfund/about.htm> (last visited Apr. 20, 2011) (“Over the past 20+ years, we’ve located and analyzed tens of thousands of hazardous waste sites, protected people and the environment from contamination at the worst sites, and involved others in cleanup.”).

61. Most CERCLA authorities have been delegated to the EPA Administrator; no presidential approval has been reserved. *See* Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

62. 42 U.S.C. §§ 5179–5180 (regarding food); *id.* § 5186 (regarding transportation).

63. 7 U.S.C. § 2013. *Compare id.* (authorizing the Secretary of Agriculture to administer a supplemental nutrition assistance program), and *id.* § 2014 (authorizing Secretary to set eligibility requirements for food stamps), with 42 U.S.C. § 5180 (authorizing President to ensure that “adequate stocks of food will be ready and conveniently available”), and *id.* § 5179 (authorizing President to act “through the Secretary of Agriculture or other appropriate agencies” to distribute food coupons through existing programs and to make surplus commodities available).

“President,” simply does not make sense of delegations currently on the books.

What makes far more sense is the interpretation that a delegation to the President does not communicate a particular intent regarding presidential direction of agency authority, but instead generally signifies simply that the President can *select* the executive branch official who receives the statutory delegation.<sup>64</sup> That is consistent with the workings of our administrative state, in which the President is widely known on occasion to exercise substantial control over executive branch agencies but cannot reasonably be expected to systematically make a particular individual decision himself.

Thus, a delegation to the Administrator under the Clean Air Act (to set national ambient air quality standards) or under RCRA (to decide what a hazardous waste disposal facility owner must do to address site contamination) is not meaningless relative to the President; it precludes the President from assigning that authority to, say, the Secretary of Agriculture or the Secretary of Commerce. Nor can the President assign authority over the Supplemental Nutrition Assistance Program to the Secretary of Energy or of Commerce.

This interpretation also makes sense of the varied presidential delegations described above. The presidential delegations are all examples in which more than one agency might have relevant institutional expertise or programmatic authority to run a program. A better reading of the delegations is that Congress intended to enlist presidential expertise regarding the work of particular executive branch agencies. CERCLA, for example, covers both offshore and onshore contamination, federal facilities, as well as the restoration of injured natural resources.<sup>65</sup> Multiple federal agencies may have relevant programmatic expertise, ranging from the EPA (cleanup standards and inland cleanups), the Coast Guard (offshore contamination), and the Commerce Department (coastal resources), to the Departments of Agriculture (national forests), Interior (national parks and wildlife), and Defense and Energy (federal facilities). Presidents have delegated CERCLA authorities sometimes to a single agency and sometimes jointly to multiple agencies, depending on the particular provision.<sup>66</sup> In addition, the Oil Pollution Act of 1990<sup>67</sup> delegates most authorities to the President. Spills could take place inland, on coastal areas,

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64. Kagan, *supra* note 12, at 2329.

65. See 42 U.S.C. § 9601(8) (defining “environment” to include “navigable waters, . . . ocean waters, . . . any other surface water . . . land surface, or ambient air within the United States or under the jurisdiction of the United States”); *id.* § 9601(16) (defining “natural resources” to include “land, fish, wildlife, biota, air water, ground water, drinking water supplies, and other such resources, belonging to, managed by, held in trust by . . . the United States . . . , any State or local government, any foreign government, [or] any Indian tribe . . . .”); *id.* § 9620(a)(1) (applying statute to “[e]ach department, agency, and instrumentality of the United States”); *id.* § 9620(a)(2) (applying statute to “facilities which are owned or operated by a department, agency, or instrumentality of the United States”).

66. See Exec. Order No. 12,580, 3 C.F.R. 193 (1988).

67. Pub. L. No. 101-380, 104 Stat. 484 (codified as amended in scattered sections of U.S.C.).

or in deep water. In each location, a different agency might offer both expertise and the advantages of efficiency, given its other institutional responsibilities. By executive order, the President has delegated lead response authority for oil spills on the coastline to the Coast Guard. Meanwhile, the President has designated the EPA as the lead agency for spills in the inland zone. Both are required to consult with a variety of other agencies and with state and local government. Different federal agencies (including the Departments of Defense, Interior, and Agriculture) are designated as natural resource trustees for purposes of assessing and restoring injury to natural resources.<sup>68</sup> Finally, the Stafford Act involves providing housing, transportation, and food to disaster victims, a range of issues implicating the expertise of multiple agencies.

By contrast, delegation to a particular executive branch agency official may simply signify Congress's awareness of agency expertise and experience and its intent that a new program be coordinated with and benefit from the expertise a particular agency has already developed in running related programs. The RCRA<sup>69</sup> statute, for example, mainly regulates land-based hazardous waste treatment, storage, and disposal facilities; accordingly, it makes sense that Congress would delegate most responsibilities to the EPA, since some of that agency's other programs also cover inland polluting activity.<sup>70</sup>

Outside of statutes with implications for defense or foreign relations or other statutes with an unusual context,<sup>71</sup> it thus makes most sense to

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68. See Exec. Order No. 12,777, § 1, 3 C.F.R. 351, 352–53 (1992).

69. See *supra* notes 58–59.

70. See 42 U.S.C. §§ 6921–6939f (setting out hazardous waste management regime, including regulation of treatment, storage, and disposal).

71. For example, section 4 of the Computer Security Act of 1987, later incorporated into the E-Government Act of 2002, called for specific, nondelegable presidential review of Department of Commerce standards for computer security. See Computer Security Act of 1987, Pub. L. No. 100-235, § 4, 100 Stat. 1724, 1726 (1988), amended by the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 5101, 110 Stat. 186, later incorporated into the E-Government Act of 2002, Pub. L. No. 107-347, § 302(a), 116 Stat. 2899, 2956 (ultimately codified as amended at 40 U.S.C. § 11331); E-Government Act of 2002 § 302(a), 116 Stat. at 2956 (“The President’s authority to disapprove or modify such standards and guidelines may not be delegated.”). The Computer Security Act of 1987 represented a strong reaction to the 1985 and 1986 issuance of directives placing control of information security in the DOD, including both classified and sensitive but unclassified information. As described in a hearing prior to the legislation, these directives expanded “DOD’s control [over] a wide spectrum of scientific, economic and cultural information in our [n]ation.” See *Computer Security Act of 1987: Hearings on H.R. 145 Before a Subcomm. of the H. Comm. on Gov’t Operations*, 100th Cong. 382 (1987) (statement of Rep. Jack Brooks). Because of congressional concern over the “‘Big Brother’ activities of DOD and NSA,” the bill placed control of information security in a civilian agency, the Department of Commerce, but with specific presidential oversight in view of the national security implications. H.R. REP. NO. 100-153, pt. 2, at 7 (1987), reprinted in 1987 U.S.C.C.A.N. 3157, 3159. As the Report explained, “The bill also establishes a presidential review process whereby the Secretary of Commerce can be directed to modify or rescind a standard when the President determines it is in the public interest to do so.” *Id.* at 10, 1987 U.S.C.C.A.N. at 3162. The statute was ultimately modified to eliminate the presidential

understand all these delegations—whether to the President, the Secretary, or the Administrator—simply as delegations into the executive branch, headed as it is by a Chief Executive with the power to remove agency heads at will. A delegation to the President generally communicates no distinct intent regarding presidential direction or control, but means simply that the President can *select* the agency. With respect to presidential directive authority, Congress’s general intent in delegating to the Administrator or the Secretary, as opposed to the President, may best be reflected, in Kagan’s words, in an “interpretive principle presuming an undifferentiated presidential control of executive agency officials.”<sup>72</sup>

For a recent example that clearly shows the meaning (or absence of meaning) of a presidential delegation in the setting of domestic legislation, consider the 2009 federal climate change legislative proposals.<sup>73</sup> The so-called Waxman-Markey legislation had passed the House and the Senate was considering climate change bills. Agriculture groups wanted the Department of Agriculture to run part of a proposed climate change program defining which greenhouse-gas-reducing agricultural projects would qualify to create saleable “offsets” for greenhouse gas emissions generated elsewhere. The Waxman-Markey bill assigned (and environmentalists preferred) responsibility for defining such offsets to the EPA.<sup>74</sup> In the Senate bill, compromise was reached on the issue by delegating authority to the *President* to, post-enactment, select the relevant agency. None of the word choices—“Secretary,” “Administrator,” or “President”—appeared to relate to presidential supervision, direction, or the lack thereof. The Senate bill used presidential delegation simply to dodge, through delegation, the question of which executive branch agency would have primary responsibility for developing offset rules.<sup>75</sup>

Are there more arguments from statutory text that ought to be considered? In 2001, Kagan suggested that one counterargument to her position would be if Congress “sometimes stipulated that a delegation . . . to an agency official was subject to the ultimate control of the President.”<sup>76</sup> The existence of such language might suggest more strongly, on an *expressio unius* theory, that the failure to mention either the President or presidential approval in another statute delegating authority to an agency official should be understood as Congress’s intent to insulate the official from presidential directive authority. Stack responded to Kagan with a

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review process. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 1002(a), 116 Stat. 2135, 2268 (rewriting 40 U.S.C. § 11331).

72. Kagan, *supra* note 12, at 2328.

73. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong.

74. *Id.* § 732(a) (authorizing EPA Administrator to “promulgate regulations establishing a program for the issuance of offset credits”).

75. See Alison Winter, *Kerry-Boxer Proposal Leaves Question Mark for Forestry Groups*, ENV’T & ENERGY DAILY, Oct. 2, 2009, <http://www.eenews.net/public/EEDaily/2009/10/02/2> (“The new Senate text gives the [P]resident jurisdiction over the potential program, rather than defining clear roles for USDA and U.S. EPA.”).

76. Kagan, *supra* note 12, at 2329.

collection of mixed delegations from the U.S. Code, arguing that their existence signifies that congressional delegation only to an executive agency official in other statutes, without mention of the President, must be understood to preclude presidential directive authority.

Despite Kagan's statement in 2001, it is not clear how strong an inference the difference in wording could yield, even if such mixed delegations were commonplace. The argument assumes that Congress's specifications of decisional procedures (such as presidential approvals) are sufficiently particular that negative implications can be drawn from their omission.

Congress, however, has expressly rejected any implication that a mixed delegation is distinct from either a delegation to the agency or a delegation directly to the President. Again, consider the Presidential Subdelegation Act. The Act permits the President to treat as identical a delegation of authority to the President by law and a mixed delegation of authority to an agency official subject to presidential approval. The President is equally empowered to delegate either function solely to an agency head "without approval, ratification, or other action by the President."<sup>77</sup> In other words, a President can readily convert *either* a presidential delegation or a mixed delegation into a simple delegation, reserving no formal approval authority whatsoever. Confirming this understanding, once in a great while Congress requires presidential approval and expressly refuses presidential authority to redelegate that approval.<sup>78</sup>

Even if the language of a mixed delegation could be read to imply reduced presidential involvement when a statute delegating to an executive agency official contains no reference to the "President," the mixed delegations Stack collects are not sufficient to support the inference he wishes to draw from the simple delegation. Nearly all the statutes he cites as examples of mixed delegations fall in one of three categories that makes

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77. See 3 U.S.C. § 301 (2006) ("The President of the United States is authorized to designate . . . [an agency official] to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President . . .").

78. *E.g.*, 42 U.S.C. § 8374(e) (restricting delegation of Presidential authority to issue emergency orders relating to energy supply); E-Government Act of 2002, Pub. L. No. 107-347, § 302(a), 116 Stat. 2899, 2956 ("The President's authority to disapprove or modify such [information security] standards and guidelines may not be delegated.") (current version, without presidential disapproval, at 40 U.S.C. § 11331). Electronic searching in the U.S. Code ("president /p 'may not be delegated'") revealed only fourteen such delegations. Moreover, as Stack himself acknowledges, Congress occasionally delegates a decision to an agency official "in the judgment" of the official, possibly implying the reservation of a greater amount of control to the agency official than in the case of the simple delegation. See Stack, *supra* note 4, at 288 n.116. Stack may be correct that these delegations and simple delegations are cognate ways of granting authority to the agency official, although one other implication is that a delegation to the agency official without "judgment" is meant to include greater space for presidential judgment. I would continue to read both of them against the backdrop of presidential supervision. These delegations also might signal that, on review, a court should be relatively deferential to the agency's final judgment on the matter.

them less relevant: pre-1950, national security, or foreign relations. At least twenty-seven of the statutes Stack cites that mention both the President and an agency deal either with national security issues or with foreign relations issues.<sup>79</sup> Both defense and foreign relations statutes potentially represent special cases, in view of Article II's text describing the President's powers not only as chief executive, but as "Commander in Chief," and her authority, subject to Senate ratification, to "make treaties."<sup>80</sup> The statutes Stack discusses, for example, include one law granting the power to "terminate any air service agreement between the United States and a country" where a determination of dangerousness is made,<sup>81</sup> and the authority to suspend operations of air carriers to and from a foreign country where the country is acting inconsistently with an international convention on unlawful aircraft.<sup>82</sup> The potential of such a suspension to disrupt foreign relations is obvious. Moreover, the Presidential Subdelegation Act continues to apply, authorizing the President to fully delegate her approval authority in these mixed delegations without restriction. Beyond this, these particular mixed delegations might be viewed as unique in their expectation of presidential involvement, owing both to the foreign relations or defense context for the particular decision and the decisions' relative infrequency. Thus, if the President did not elect to redelegate the authority, it would be more reasonable to understand Congress's view of presidential supervision in the particular context as both more realistic and more valuable. No across-the-board inference about the meaning of the simple delegation can fairly be drawn from these distinctive mixed delegations.

With respect to domestic policy, many of the mixed delegation statutes Stack cites and discusses are pre-1900, prior to the creation of the modern supersized administrative state and well prior to the Presidential Subdelegation Act. Fourteen of the mixed delegation statutes outside the national security or defense setting he cites are pre-1900.<sup>83</sup> (Eight statutes

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79. These statutes are cited in Stack, *supra* note 4, at 278–85, nn.67–69, 74, 78–79, 84–85, 87, 89–90, 92–98, 107. Two additional statutes that arguably fall in this category are cited in *id.* at 281 n.85, 283 n.101. See also *id.* at 281 n.90 (citing E-Government Act of 2002, Pub. L. No. 107-347, § 302(a), 116 Stat. 2899, 2956 (current, amended version at 40 U.S.C. § 11331(d)) ("To ensure fiscal and policy consistency, the Secretary shall exercise the authority conferred by this section subject to direction by the President and in coordination with the Director of the Office of Management and Budget.")). As explained in note 71, the mixed delegation language in the E-Government Act dated from an earlier statute, the Computer Security Act of 1987, that was specifically passed in response to DOD assertions of control over federal government and contractor computer systems. It was part of moving primary responsibility for computer security to a civilian agency, but subject to express presidential oversight in view of national security issues. The presidential role in the delegation has since been deleted.

80. U.S. CONST. art II, § 2, cl. 1–2.

81. 22 U.S.C. § 5605(b)(2)(F)(ii)(I).

82. See Stack, *supra* note 4, at 287 nn.109–12 and accompanying text (citing 49 U.S.C. §§ 40106, 41302(b), 41304(b), 41302, 44907(d)(1)(D), 44907(e)).

83. See Stack, *supra* note 4, at 279–81 nn.72–80, 84 (citing older domestic mixed delegation statutes).

are both pre-1900 and relate to national security or defense issues.<sup>84</sup> Three more mixed delegations outside the national security or defense setting are pre-1950, before Congress enacted the Presidential Subdelegation Act.<sup>85</sup> And as noted above, the Presidential Subdelegation Act now effectively revises these statutes by permitting the President to convert freely a presidential delegation or a mixed delegation into the equivalent of a simple statutory delegation.

Of the multitude of statutes Stack discusses, twelve both are post-1950 and concern domestic policy issues.<sup>86</sup> Ten of the twelve require that the action involve more than one executive branch agency, either through joint rulemaking or through consultation.<sup>87</sup> This characteristic again suggests that the mention of the President is not meant to indicate greater presidential direction, but instead is an express command of coordination among multiple executive branch agencies. Of the two remaining statutes, the history and context of one, the E-Government Act of 2002, turns out to implicate national security concerns.<sup>88</sup> In the last one, the Full Employment and Balanced Growth Act of 1978,<sup>89</sup> the President is to act “through the Secretary of Labor” to encourage full employment, but the statute then sets forth criteria which the *Secretary* is to apply in “meeting the responsibilities” under that section, undermining any inference that the

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84. These statutes are cited in Stack, *supra* note 4, at 278–81 nn.67–69, 74, 78–79, 84.

85. See Agricultural Adjustment Act, ch. 25, 48 Stat. 31, 37 (1933) (codified as amended at 7 U.S.C. § 610(c)) (authorizing Secretary of Agriculture, with “approval of the President,” to make regulations to carry out its provision); Stack, *supra* note 4, at 281 n.83 (citing Act of Aug. 11, 1939, ch. 717, § 2, 16 U.S.C. § 590z); *id.* at 286 n.107 (citing Act of June 6, 1942, ch. 380, 16 U.S.C. § 459r (authorizing Secretary of Interior “with the approval of the President” to convey or lease “recreational demonstration projects”)); see also 16 U.S.C. § 704 (first enacted 1918) (requiring presidential approval of Interior rules permitting migratory bird hunting notwithstanding treaty).

86. These are cited in Stack, *supra* note 4, at 281–86 nn.85–86, 90, 91, 94, 99–101, 108.

87. See Enhanced Border Security and Visa Entry Reform Act, 8 U.S.C. § 1701(6) (coordination through multiple executive agency officials); 22 U.S.C. § 7104(b) (President to establish programs “through” Secretaries of Labor, HHS, and State, and the Attorney General); Trafficking Victims Protection Reauthorization Act of 2003 § 6, 22 U.S.C. § 7109a (providing for President to act through multiple agencies); 31 U.S.C. § 5341(a)(1) (President to act “through” Treasury Secretary and Attorney General in developing strategy to combat money laundering); 33 U.S.C. § 2706(e)(1) (coordination with Commerce, Fish and Wildlife Service, and EPA on damage assessment regulations); 40 U.S.C. § 17302(a) (providing for joint Treasury and Postal Service rulemaking); 49 U.S.C. § 44302(d) (providing for interagency consultation as condition of presidential approval of agency decision to insure air carriers); Act of Sept. 8, 1982, Pub. L. No. 97-254, 96 Stat. 808 (coordination between Commerce and other designated officials on 1984 Louisiana World Expo); Act of Dec. 29, 1979, Pub. L. No. 96-169, 93 Stat. 1281 (coordination between Commerce and other designated officials on 1982 International Energy Expo); see also 33 U.S.C. § 2706(e)(1) (authorizing the President “through” the Under Secretary of Commerce for Oceans and Atmosphere to promulgate regulations for natural resource damage assessment following oil discharge, in consultation with EPA and other agencies); *supra* note 26–33 and accompanying text (citing delegations).

88. See *supra* notes 71, 78.

89. Pub. L. No. 95-523, 92 Stat. 1887 (codified in scattered sections of 15 U.S.C.).

statute mentions the President particularly to ensure presidential direction or the Secretary particularly to limit it.<sup>90</sup>

In sum, the mixed delegations Stack cites do not seem to rebut the interpretation offered above. Absent some special context, a statutory delegation to the “President” or to an executive agency does not seem to represent a particular Congressional intent regarding the extent of presidential direction or even supervision of agency action. By contrast, a delegation to the President clearly is meant to authorize the President to allocate the primary implementation responsibility, while a simple delegation restricts that authority to allocate. In short, text alone is not sufficient to resolve the statutory permissibility of presidential directive authority.<sup>91</sup>

## II. THE STAKES OF THE INTERPRETIVE DEBATE

The scholars who argue that a simple delegation implies some limit on presidential control of an agency decision also argue that such an interpretation is important because it can facilitate a useful agency resistance to presidential control. As I briefly discuss below, however, the very subtlety of the difference between “presidential supervision” and “presidential direction” undermines the extent to which a simple delegation might supply an agency head with greater resolve.

What the terms of the interpretive debate do underscore is a high level of concern, particularly among these commentators, regarding presidential supervision of agency action. I agree that presidential direction of agency decision making can be potentially problematic.

In my view, however, the debate over statutory text is not helpful in resolving precisely how much presidential control or direction of agency activity is permissible. Instead, we should seek greater transparency to help us uncover and evaluate whether presidential supervision and direction enhances or detracts from the legitimacy of agency action.<sup>92</sup> And an improved understanding of the extent of presidential supervision and its effects on agency action could inform legislation that actually does speak specifically to presidential supervision.

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90. *Id.* § 206; 15 U.S.C. § 3116. A possible explanation for the statute’s reference to the “President” is for consistency with other sections of the statute referencing the President.

91. Kagan argues at this point that resort must be had to general interpretive principles to resolve the question left open by the text. *See* Kagan, *supra* note 11 at 2331 (“the statutory question (whether the President, in exercising directive authority, is acting in accordance with a standard delegation) . . . itself turns on a policy question (whether the action promotes good administrative lawmaking)”) That position is beyond the scope of this article, in view of my discussion in Section II.

92. I have argued elsewhere that greater transparency is necessary for presidential control to serve any legitimating function for the administrative state. *See* Nina Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1159 (2010) (“The lack of adequate transparency [undermines both] the appropriateness of presidential influence and . . . the legitimacy of agency decision making.”).

*A. Backbone*

Stack and Strauss make the particular argument that understanding a simple delegation to deprive the President of directive authority could make a difference to the attitude of agency officials. Such officials, they argue, will have more fortitude with which to confront the erring President or his staff if the authorizing statute can be read to give them, rather than the President, the right to make the final call on the issue at hand.<sup>93</sup> They further assert that, given this understanding of the statute, a poorly performing agency official would not be able to avoid accountability by blaming the President.<sup>94</sup>

With respect to agency accountability, however, agency officials rarely, if ever, publicly point a blaming finger at the President. Agency statements in support of a rule, for example, do not generally mention the President, presidential preferences, or even the content of OMB/OIRA reviews.<sup>95</sup> If anything, the problem is the reverse, with the President attempting to maintain deniability for unpopular agency decisions.<sup>96</sup>

What about the argument that a simple delegation can supply an agency official with greater resoluteness? The empirical basis for this claim is very far from clear. Even if a simple delegation to an agency official *were* intended to insulate the agency official from presidential directive authority and merely make the President the “overseer,” it would seem to make little practical difference. As a formal matter, as all concede, the President would still possess the power to remove. Moreover, the permissibility of presidential oversight and supervision of executive branch agency decisions is also widely conceded, including the President’s ability to influence an agency to prioritize one policy over another, to communicate strong policy preferences, or to require that one agency meet the concerns of another in reaching a decision. Even if a simple delegation were read to preclude presidential directive authority, then, the President would continue to have the power to coordinate, influence, or even cajole.<sup>97</sup>

For the statutory language to prompt greater resistance, then, the agency official responding to presidential pressure first would have to draw a line between influence (permissible) and direction (impermissible), and the

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93. See Stack, *supra* note 4, at 295. Sargentich argues that backbone will be most useful in discussions not with the President, but with White House staff. Sargentich, *supra* note 3, at 9; see Percival, *supra* note 4, at 1005 (“[T]he agency head will be bargaining with greater moral authority than she would have if she knew the president had a right to dictate the decision.”).

94. Cf. Strauss, *supra* note 1, at 712 (“[D]oes she take it as a command that she has a legal as well as a political obligation to honor, and for whose justifications she *thus has no particular responsibility?*” (emphasis added)).

95. See Mendelson, *supra* note 92, at 1146–59.

96. See *id.* at 1161–63; *infra* note 124–28 and accompanying text.

97. E.g., Percival, *supra* note 4, at 971 (simple delegation argument “does not mean that the president is prohibited from communicating with the agency head concerning his preferences for how the decision should be made”); Stack, *supra* note 3, at 294 (“[I]t will be difficult for a court to police the line between presidential influence, on the one hand, and presidential direction of agency action, on the other.”).

statute's interpretation would presumably only make a difference to the agency official in the latter case. The line between those two situations is bound to be difficult to draw.<sup>98</sup> Consider the executive agency official selected by the President, subject to at-will removal by the President, whose agency rule is in the middle of the regulatory review process. The official hears the following statement from a White House official involved in regulatory review: "The President would really, really strongly prefer that you select Option A." Is this permissible influence or impermissible direction? A more difficult example: "The Agriculture Department's view is that your preferred choice would cause tremendous difficulties with a program they already administer. We must ask you to choose Option B to avoid this conflict with Agriculture." In this latter case, Percival has argued that the case for having the President resolve the conflict is "considerably stronger because the White House is uniquely situated to resolve conflicts between agencies."<sup>99</sup> Perhaps this is in part an argument why an agency official, in the exercise of his or her decision-making authority, ought to pay particular attention to the White House's view. But it is not clear why this scenario represents any less displacement of the purported statutory delegation. And if Agriculture's concerns, say, ought to be treated as relevant by the decision-making agency, perhaps pushing that agency's final decision in a different direction, why not the President's overall goals for national policy? In short, the difficulty faced by an agency official in applying this interpretation of statutory language to close cases means that a simple delegation, even if it is interpreted as these commentators suggest, is unlikely to add more than a touch of calcium to the agency official's bones.

Moreover, whatever the interpretation of the simple delegation, the agency official also, as a practical matter, retains the same leverage. The decision still must comply with substantive statutory criteria and procedures, whether or not there is White House involvement. That constrains the President's influence just as it constrains the agency's discretion.<sup>100</sup> The agency official's view of what that law requires—and what reasons best satisfy the law—will surely also influence the official's willingness to accede to presidential influence, and that understanding is likely to be clearer than identifying whether presidential influence has overstepped the line of "direction."

Second, the agency official still has practical control of the institution that must, in the first instance, develop the record supporting the rule (whether it is automotive fuel efficiency standards or contaminated site cleanup standards), either because the statute names the agency or the President has delegated the authority to the agency by executive order. The

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98. Cf. Sargentich, *supra* note 3, at 21 ("[T]he distinction between presidential influence, supervision, advice, and persuasion on the one hand, and controlling, displacing, commanding, and directing on the other, can be subtle in practice.").

99. Percival, *supra* note 4, at 998.

100. Percival describes, for example, an HHS Secretary's successful argument to President George H.W. Bush that his desired policy choice was not supported by the rulemaking record. *Id.* at 994–95.

White House needs the cooperation of the agency official, including the staff and resources at her disposal, and this represents an ongoing incentive for the White House to negotiate with agency staff, rather than to direct.<sup>101</sup>

Third, if the statute contains a simple delegation, the statute's plain language probably precludes the President from signing a Federal Register notice if the agency official does not, even if the simple delegation is interpreted to include presidential directive authority. (In the event of a presidential delegation redelegated to an agency official, the President would have to revoke the delegation to sign the Federal Register notice.<sup>102</sup>) This, too, gives the agency official some leverage, though one implication of the textual analysis above is that it may not be leverage specifically intended by Congress.<sup>103</sup>

Finally, whatever the simple delegation's interpretation, the agency official retains leverage in a particular case to inflict political costs on the President by resigning in protest or by forcing the President to fire her.<sup>104</sup> Whether a President's pressure amounts to impermissible directive authority or pressuring influence—and even if the statute says “President” and the agency official has received the power by delegation—the agency official can respond, “I won't do it; you will have to fire me.” Strauss alludes to two agency officials who told “the President to pound sand . . . [and] the President knew they had the political capital to win.”<sup>105</sup> Without knowing the circumstances at hand, we cannot know for sure whether the statutes these officials were enforcing contained simple delegations directly to the agency official. More critically, the *public* is highly unlikely to know that information. Either way, the officials could impose the same political costs on the President.

Strauss also recounts the story of President Andrew Jackson's efforts to get two Treasury Secretaries to remove the government's funds from the National Bank and deposit them in state banks. The Secretaries refused and had to be removed. Ultimately, Jackson appointed Roger B. Taney Acting Secretary, and Taney complied, resulting in a “political furor” and a Senate Resolution of Censure against Taney. Strauss argues that this narrative in

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101. Cf. Kagan, *supra* note 12, at 2272–73 (noting that Presidents Richard Nixon and Jimmy Carter both viewed themselves as being surrounded by hostile and unresponsive bureaucracies).

102. Such a revocation would be highly unusual, and I have not succeeded in locating one.

103. Cf. *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1544, 1546 (9th Cir. 1993) (prohibition on *ex parte* contacts applied to President when formal adjudication decision vested in other agency officials despite arguments that the President is the “center of the Executive Branch”).

104. See Sargentich, *supra* note 3, at 8 (“There is an outer limit on the number or frequency of terminations that any administration can tolerate without suffering the negative political repercussions of instability.”).

105. Strauss, *supra* note 1, at 736; see also Percival, *supra* note 4, at 995 (reporting that Federal Drug Administration Administrator Kessler and HHS Secretary Sullivan were prepared to resign over dispute with the White House on content of nutritional disclosure rule).

part illustrates Jackson's acceptance of the proposition that "his control lay only over the officeholder and was not a power of decision."<sup>106</sup> The narrative also illustrates, however, the power of top agency officials to inflict political costs on the President by forcing him to remove them. In Percival's words, when an executive officer refuses to follow the President's preferences, it serves "as an alarm signal to the public that the president may not be acting with fidelity to the law or in the best interest of the country."<sup>107</sup>

The hero of this type of story is the agency official who stands up for the right decision, even at the significant personal cost of losing her job. The wording of the statute changes little, if anything at all, about either the President's ability to remove the official or the agency official's ability to force her to that point. And the official may gain the sense of gratification that comes with knowing he or she has done the right thing, as well as public accolades and the respect of his or her peers.

Regarding the official's ability to resist inappropriate presidential pressure or positions, other features of the agency official's position might be just as important as whether the statute says "Administrator" or "President" (delegated through Executive Order to the "Administrator.>"). Consider a recent statement from Professor Jack Goldsmith, former head of the Department of Justice's Office of Legal Counsel, and now well-known for standing up to White House officials:

It's important that there be a Senate-confirmed person at the head of the Office of Legal Counsel, both because it helps secure the independence of the office when it's making legal judgments and because it helps give the office more authority, both within the Justice Department and throughout the government.<sup>108</sup>

Top agency officials, of course, generally possess this imprimatur of authority.<sup>109</sup>

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106. Strauss, *supra* note 1, at 707 n.56; *see id.* at 706–07 nn.47–57.

107. *Id.* at 963.

108. Carrie Johnson, *Obama Picks New Nominee for Legal Counsel's Office*, NPR, Jan. 5, 2011, <http://www.npr.org/2011/01/05/132681380/obama-picks-new-nominee-for-legal-counsels-office> (quoting former Office of Legal Counsel head Jack Goldsmith on the nomination of Virginia Seitz to head the office). Goldsmith authored *The Terror Presidency*, recounting his attempt to stand up to the George W. Bush White House. *See generally* Strauss, *supra* note 1, at 718 ("[P]olitical obligations to the Senate, even promises made, may create back-currents that can stiffen resolve against presidential prodding."); Jeffrey Rosen, *Conscience of a Conservative*, N.Y. TIMES MAG., Sept. 9, 2007, at 40 (profiling Goldsmith).

109. *See generally* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 913–14 (2009) ("[O]ver 1100 Senate-confirmed presidential appointees are supposed to run [federal] agencies and direct these policy decisions, comprising a small but critically important component of a federal workforce of over 2.5 million employees.").

*B. Addressing Presidential Supervision Directly*

Finally, it is worth focusing on why the interpretive issue has prompted so much debate, given the lack of statutory clarity on the question. The interpretive argument made by Stack, Strauss, Sargentich, and Percival, if accepted, theoretically empowers agency officials to resist the White House's growing assertions of power to control the agencies. As I have argued, however, statutes with simple delegations to executive agency officials cannot generally be read to communicate a distinctive intent regarding presidential directive authority, compared with a typical presidential delegation. And even reading simple delegations this way may not particularly strengthen an agency official's hand against the President. Meanwhile, other features of the executive branch, the statutes, and the President-agency relationship may offer support for an agency official in resisting presidential policy preferences she sees as wrong.

Ultimately, then, interpreting the term "Secretary" or "Administrator" will not resolve the question whether the President should be directing an executive branch agency's actions. As we assess the broader question of the desirable scope of presidential control, we should put the textual question aside; greater disclosure and assessment of the effects of presidential control would be a more useful approach.

As has been widely noted, Presidents have been claiming ever-increasing power to supervise decisions traditionally developed primarily in the agencies. That has raised concerns, particularly to the extent that oversight operates to displace or dismiss valuable agency experience and expertise that has developed over long periods of time.<sup>110</sup> That oversight could displace agency expertise either in the context of a particular decision or in an agency's determination of which issues deserve top priority.

Further, as Strauss has argued, agency decision making may have significant institutional advantages compared with presidential or White House decision making. For example, presidential directive authority is likely to mean, practically, not that the President herself makes the decision, but rather that the decision will be made "within an apparatus of a few thousand White House employees" in a relatively opaque institution "in contrast to a decision reached by a politically accountable agency administrator with the help of a more extensive and expert staff operating under those conditions of enhanced transparency and procedural regularity."<sup>111</sup> As Strauss argues, an agency notice and comment rulemaking process is surely more public than comparatively opaque White House deliberations, and agency officials are more available for

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110. See, e.g., Mendelson, *supra* note 92, at 1141-44 (outlining types of presidential pressure that "seem clearly out of bounds").

111. Strauss, *supra* note 1, at 753; see also *id.* at 754 (The "President's will" will often be a "bolt of lightning hurled by one unelected operative" with more political pressure, less staff support, stretched expertise, and fewer obligations of procedural regularity, compared with "another unelected operative enjoying significant virtues from a rule-of-law perspective.").

congressional oversight hearings than the President, although the President and her staff might reasonably be understood to be more politically accountable through the electoral process.<sup>112</sup> One risk here is that well-organized interest groups may have particular access to the White House, or that the White House may have a particular axe to grind that should not be seen as relevant to the policy decision.<sup>113</sup>

These arguments, only briefly summarized here, all suggest that presidential authority over executive branch agencies tends to degrade, rather than to legitimate, decision making in the administrative state. This is consistent with a concern occasionally expressed both in congressional hearings and in some court opinions about “raw politics” entering agency decision making.<sup>114</sup> As I have argued elsewhere, moreover, a President certainly should not be able to push an agency official to disregard legal requirements or to slant scientific findings either in deciding the content of a particular action or in deciding that no action at all should be taken.<sup>115</sup> These issues are implicated in recent allegations regarding political manipulation of agency scientific research.<sup>116</sup> This “White House supervision,” to the extent it occurs, seems out of bounds.

Strauss, Sargentich, Stack, and Percival all argue persuasively that to the extent presidential power, whether to influence or direct, is misdirected, agency resistance can be a highly useful offset. “The representation of

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112. See CURTIS W. COPELAND, CONG. RESEARCH SERV., RL 32397, FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS, SUMMARY (2009) (“[OMB] is part of the Executive Office of the President, and helps ensure that covered agencies’ rules reflect the President’s policies and priorities.”); Kagan, *supra* note 12, at 2338 (arguing that Office of Management and Budget/Office of Information and Regulatory Affairs (OMB/OIRA) review is part of presidential supervision); Mendelson, *supra* note 92, at 1147.

113. See Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1306 (2006) (suggesting President may be as susceptible to interest group pressures as agency is); see, e.g., Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 85 (2006) (“According to 57% of EPA respondents, interest groups were sometimes able to persuade the White House to seek changes in EPA rule-makings, and 29% said often.”). But see Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 882 (2003) (“Nor does the White House appear to cater to certain types of interests and not others.”).

114. E.g., Sargentich, *supra* note 3, at 35 (“By being somewhat shielded from the political process, agencies arguably are well-suited to address difficult issues on the merits without constant intrusions of raw politics into the process.”); Stack, *supra* note 4, at 322 (“[W]e are better off with a conception of the agency official’s role that emphasizes the official’s independent duty under the law . . . [and] it depends on the good judgment of those who exercise authority.”).

115. See Mendelson, *supra* note 92, at 1141 (arguing that “out of bounds” presidential pressure includes influence “that prompts the agency to ignore its factual or technical conclusions”).

116. See Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 TEX. L. REV. 1601, 1603–19 (2008); Wendy Wagner & Rena Steinzor, *Rescuing Science from Politics: Regulation and the Distortion of Scientific Research*, White Paper No. 604 (Ctr. for Progressive Reform, 2006), available at [http://www.progressivereform.org/articles/Rescuing\\_Science\\_604.pdf](http://www.progressivereform.org/articles/Rescuing_Science_604.pdf).

diversity is a key attribute of a well-functioning system of checks and balances” that critiques the ratification of “the preferences of a single power center.”<sup>117</sup> And, in Stack’s words, “the mere possibility of resistance [by an executive official] creates a legal check on presidential abuse internal to the executive branch: [t]he President must persuade or fire the official, rather than simply bind that official to his views.”<sup>118</sup> In the context of assessing the effects of personnel “burrowing” at the end of a Presidency, I have similarly argued that viewpoint diversity inside agencies, as well as the presence of civil service holdovers in relatively senior positions from previous administrations, can result in an agency considering a wider range of important viewpoints and the potential moderation, stabilization, and improvement of agency policies.<sup>119</sup> As Neal Katyal has argued, the civil service can serve as an important check on executive power.<sup>120</sup>

But we simply do not know that White House supervision, or even direction, is all distorting or inappropriate and that, accordingly, we should want to maximize, at all costs, executive agency resistance.<sup>121</sup> Presidential supervision also has its well-recognized virtues—coordination, direction, and energy among them—and as Jerry Mashaw argued, the ability to take a national perspective.<sup>122</sup> That perspective may be relatively lacking in Congress.<sup>123</sup> Taking the broader view is clearly also valuable compared to the narrow jurisdictional view likely to be taken by the leadership of an individual agency.

Further, agency decision making is not flawless either. Like presidential decision making, agency decision making can be irrational, myopic, or overly responsive to particular interest groups.<sup>124</sup> Consider the scandal involving EPA official Rita Lavelle and EPA Administrator Anne Gorsuch Burford during the Reagan years. The Burford/Lavelle scandal, one of the biggest government scandals during that period, centered around allegations that the EPA’s Superfund hazardous waste cleanup program was tainted by conflicts of interest and managed for political purposes, and that the agency

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117. Sargentich, *supra* note 3, at 6.

118. Stack, *supra* note 4, at 316, 322; *accord* Sargentich, *supra* note 3, at 35.

119. See Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 646 (2003); see also Nina Mendelson, *Midnight Rulemaking and Congress*, in TRANSITIONS (Austin Sarat ed., forthcoming 2011) (manuscript at 13) (on file with author) (arguing that less policy making dialogue may take place inside White House compared with Congress).

120. See generally Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

121. See Bressman & Vandenberg, *supra* note 113, at 50 (“[S]elective [presidential] intervention is not all bad. It may comport with political priorities and even facilitate political accountability where it happens to exist.”).

122. JERRY L. MASHAW, GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 152–53 (1997); *accord* THE FEDERALIST NO. 70 (Alexander Hamilton).

123. See MASHAW, *supra* note 122, at 153.

124. See generally Nicholas Bagley, *Agency Hygiene*, 89 TEX. L. REV. SEE ALSO (2010), <http://www.texaslrev.com/sites/default/files/seealso/vol89/pdf/89TexasLRevSeeAlso1.pdf> (discussing measures to reduce “agency capture”).

negotiated “sweetheart deals” with companies responsible for hazardous waste cleanup.<sup>125</sup> It is worth noting that although the White House disclaimed responsibility for the officials’ actions, the EPA was implementing a statute where the delegations ran almost entirely to the President.<sup>126</sup> Rather than the agency officials avoiding accountability by blaming the President, this was, if anything, a situation where the President blamed the agencies and tried to distance himself from agency function. In the words of a contemporaneous newspaper article, “The White House has consistently stated that it had minimal contact with the agency on the conduct of the toxic waste programs” although “White House contacts with Miss Lavelle when she was running the toxic waste programs were ‘far more extensive [than] either Ms. Lavelle or White House officials have acknowledged.’”<sup>127</sup> After a variety of problems at EPA were publicly reported, White House officials announced that the White House “ha[d] begun keeping a close watch over the [EPA].”<sup>128</sup>

Commentators have also criticized agency decision making as sometimes flawed and shortsighted and as misallocating resources. In his academic writings, Justice Breyer argued, for example, that three significant problems plagued agency decision making: “tunnel vision,” randomness in agency selection of regulatory targets, and inconsistency among agency regulatory approaches.<sup>129</sup> Presidential oversight and coordination may be valuable to offset these tendencies.

Further, as I have argued elsewhere, there is nothing *inherently* delegitimizing about an agency considering reasons offered by elected officials—so-called “political reasons.”<sup>130</sup> As I have argued, whether those reasons prove problematic can depend on the content both of those reasons and of the question the agency must resolve. Consider that within their broad delegations, agencies now receive from Congress the authority to resolve far more than technical questions. The significant issues agencies resolve very often include what we might consider core questions of value—whether risks presented are “unreasonable”<sup>131</sup> or whether particular

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125. See, e.g., Philip Shabecoff, *Rita Lavelle Gets 6-Month Term and is Fined \$10,000 for Perjury*, N.Y. TIMES, Jan. 10, 1984, at A1 (Rita Lavelle charged with “favoritism to business and Republican political candidates and failure to use the \$1.6 billion hazardous waste cleanup fund in a timely fashion to clean up toxic waste sites”).

126. See *supra* text accompanying notes 52–54 (discussing delegations to President in CERCLA).

127. *House Report on E.P.A. Charges White House Still Withholds Data*, N.Y. TIMES, Aug. 31, 1984, at A13; accord C.M. Cameron Lynch, Note, *Environmental Awareness and the New Republican Party: The Re-Greening of the GOP?*, 26 WM. & MARY ENVTL. L. & POL’Y REV. 215, 222 (2001) (describing Burford/Lavelle scandal).

128. Philip Shabecoff, *White House Has E.P.A. on Political “Watch List”*, N.Y. TIMES, June 14, 1982, at B11.

129. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* 11–29 (1993).

130. See Mendelson, *supra* note 92, at 1141–46.

131. See 21 U.S.C. § 342(f)(1)(A) (2006) (regarding regulation of dietary supplements that present “significant or unreasonable risk of illness or injury”); 49 U.S.C. § 30102(a)(8)

standards are “reasonably necessary or appropriate” to protect health.<sup>132</sup> These may require resolving debates about whether, say, the government should address known risks by setting standards and restricting the sale of products or whether disclosure of information is sufficient to make risks “reasonable” because consumers can make their own choices.<sup>133</sup> Take the recent debate regarding whether the Department of Agriculture should permit New York City to restrict the use of federal food stamps to purchase sodas. This issue that surely involves more than the impact of soda on nutritional health.<sup>134</sup>

A central argument for the legitimacy of the administrative state, including its priority-setting and resolution of value-laden questions,<sup>135</sup> has been that agencies are accountable to the President, who is in turn accountable to the electorate. Agencies are thus more likely to be democratically responsive in resolving these questions of value. Arguments that agency decisions can be seen as more legitimate because of presidential control have been thoroughly discussed elsewhere, including in my own work.<sup>136</sup> One obvious implication of this sort of argument, though, is that presidential supervision of agency decisions can be desirable and legitimating.

I have recently argued elsewhere that if presidential influence is to serve any legitimating function for agency conduct, greater disclosure of the content of presidential supervision—even in abbreviated form—is essential.<sup>137</sup> Otherwise, the electorate may not fully understand the extent of actual or potential presidential supervision of agency decisions, particularly given presidential efforts to maintain “deniability.”<sup>138</sup> Under

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(defining “motor vehicle safety” as performance in a way that “protects the public against unreasonable risk of accidents occurring”).

132. *E.g.*, 29 U.S.C. § 652(8) (“The term ‘occupational safety and health standard’ means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.”).

133. *See, e.g.*, Exec. Order No. 13,563, § 4, 76 Fed. Reg. 3,821, 3,822 (Jan. 18, 2011) (“[E]ach agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice . . . . These approaches include warnings . . . and disclosure requirements . . .”).

134. *See* Anemona Hartocollis, *Food Stamps as New Front in Soda Wars*, N.Y. TIMES, Oct. 7, 2010, at A1.

135. Strauss acknowledges that on issues of agenda setting, “one might find considerably greater room for the presumption of directorial authority.” Strauss, *supra* note 1, at 757.

136. *See generally* MASHAW, *supra* note 122, at 152–53 (describing presidential control model); Evan J. Criddle, *Fiduciary Administration: Rethinking Popular Representation in Agency Rulemaking*, 88 TEX. L. REV. 441 (2010) (criticizing presidential control model); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997) (same); Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357 (2010) (same); Kagan, *supra* note 12, at 2339–40; Mendelson, *supra* note 92, at 1135–38 (describing and critiquing presidential control model).

137. *See* Mendelson, *supra* note 92, at 1146–59.

138. *See id.* at 1161–62; *supra* notes 124–27 and accompanying text.

these circumstances, holding the President accountable through the electoral process for actions of the administrative state will be doubtful at best.

But the needed transparency is lacking. Presidential influence over agency decision making, though it is extensive, remains surprisingly opaque. Although the vast majority of significant agency rules are changed in the regulatory review process in OIRA, the content of OIRA influence over the regulatory review process is difficult to discern, as I have documented elsewhere. That information is difficult to locate and systematically disclosed by neither OIRA nor the agency.<sup>139</sup> And Presidents continue to choose to distance themselves from agency function even as they seek to influence it. In January, 2011, for example, President Barack Obama wrote an op-ed that included a story of the EPA's maintaining a hazardous designation for saccharin despite the FDA's approval of it for consumption as he laid out principles for a "21st century regulatory system."<sup>140</sup> Greater disclosure would help the electorate better understand the extent of presidential control, as well as possibly helping to deter presidential influence that we would see as negative or corrupting of the agency decision-making process.

More to the point, greater disclosure also would help us assess the content of presidential influence over agencies and evaluate whether presidential influence should be seen as beneficial in the main, a vehicle for special interest pressure, or second-guessing to poor effect technical expertise that traditionally has resided in the agencies. In turn, that could help inform legislation, particularly in the domestic policy setting, that actually does speak clearly to presidential supervision.

#### CONCLUSION

Strauss, Stack, Percival, and Sargentich have all argued that we should construe statutory delegations, where possible, to increase the ability of executive branch agency officials to resist presidential control. An active policy dialogue within the executive branch that thoroughly engages both presidential and agency offices seems likely to prompt better overall decision making simply because a wider range of viewpoints will be expressed in such a deliberation. And agency resistance offers something of a safeguard against misguided presidential decision making, as presidential supervision does in the case of agency decision making. Whether construing a simple delegation as limiting presidential directive authority would help increase agency resistance, as these commentators

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139. Mendelson, *supra* note 92, at 1146–70. A search of the OIRA review database on [www.reginfo.gov/public/do/eoHistoricReport](http://www.reginfo.gov/public/do/eoHistoricReport), as well as a review of the results, revealed that of all economically significant rules for which review was completed in calendar year 2010, not one of the 138 rules was reported as approved without change. Results are on file with author. Of the 138 rules identified in the search, 132 were reported as "approved consistent with change" or "withdrawn," and six as "statutory or judicial deadline" without information on change.

140. See Barack Obama, Op-Ed., *Toward a 21st Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17.

argue, is far from clear, however. And Kagan's position that a simple delegation cannot generally be interpreted as a distinctive congressional effort to limit presidential direction is ultimately the more convincing position.

It is also unclear whether the President ought to be the "decider" of a difficult question delegated by Congress to the executive branch or whether an executive agency official should make the final call. In my view, that may depend on the question's content—whether it is primarily technical or one of value. It also may depend on the processes used in the agency, the White House, or both. Rather than searching for meaning that turns out to be largely absent in the statutory texts, we should seek greater disclosure of presidential supervision to help us evaluate this question and potentially inform legislation that does speak specifically to whether Presidents may direct agency action.