

ARTICLES

THE EMPHASIS ON THE PRESIDENCY IN U.S. PUBLIC LAW: AN ESSAY CRITIQUING PRESIDENTIAL ADMINISTRATION

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PREFACE

This piece is the final article written by our beloved colleague, Professor Thomas O. Sargentich, who passed away in April 2005. See In Memoriam, Thomas O. Sargentich, 57 ADMIN. L. REV. i-vii (2005). Tom was working on this piece until his last few days, and it was ninety-five percent complete. At the behest of his family, we simply did a little cite-checking, updating, and polishing. But the substance of the piece is one hundred percent Tom's.

Professor Sargentich was a nationally recognized scholar in the areas of administrative law and constitutional separation of powers. He was active in the American Bar Association's Section of Administrative Law and Regulatory Practice, serving as Co-chair of the Committee on Constitutional Law and Separation of Powers from 2000 to 2004 and, at various times, as a Vice Chair of that and other committees. His writings

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covered numerous aspects of separation of powers and administrative law (see "Selected Works of Thomas O. Sargentich," In Memoriam, at iii-iv).

In this Article, Professor Sargentich addresses the role of the President with regard to administrative agencies and the growing prominence of a "mystique" of presidential power. Professor Sargentich explores these issues by critiquing the thesis of Dean Elena Kagan of Harvard Law School—published in Presidential Administration, 114 HARV. L. REV. 2245 (2001)—that, as a matter of statutory interpretation, the President should be presumed to have power simply to order executive agencies to take action that the President deems desirable, even when congressional legislation has expressly delegated decisionmaking authority to the head of the agency and not the President.

Professor Sargentich urges caution regarding this presidential mystique. He argues that this position relies upon a one-sided and exaggerated picture of executive virtues and an overly limited depiction of Congress, congressional committees, and administrative agencies. He suggests ways in which the presumption of presidential power over the agencies and the presidential mystique informing it diminish the vigor of pluralistic debate that is vital for informing governmental decisionmaking. And he argues for a richer vision and reality of checks and balances within American government.

In focusing on the need to recalibrate the balance of powers between the Congress and the President, Tom Sargentich had his finger on an issue that has increasing salience in many areas of our policies, foreign and domestic. We will miss his steady counsel on these and other issues, but we are pleased his last cautionary words will be printed in this Law Review, which he revered so much.

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INTRODUCTION

There have been continuing and justified concerns about the vast power of unelected agency officials in our democratic system.¹ Over the past two decades, much constitutional and administrative law discourse has emphasized the President as an actor whose oversight can legitimate the existence of far-reaching agency authority.

Emphasis on the Presidency is visible in numerous debates. For instance, discussions of judicial deference to an agency’s legal conclusions often echo the Supreme Court’s emphasis in *Chevron* that the President is more accountable to the public than are the courts.² To the extent that the President oversees agencies, it is said that courts should give deference to an agency’s understanding of its authorizing statute to uphold the accountability principle.³ Moreover, supporters of centralized executive oversight of agency regulations argue that it promotes the comprehensive rationality of the decisionmaking process.⁴

1. See JAMES O. FREEDMAN, *CRISIS AND LEGITIMACY: THE ADMINISTRATIVE PROCESS AND AMERICAN GOVERNMENT* (1978) (discussing the recurrent crisis of the legitimacy of the United States administrative process).

2. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

3. See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 94-95 (1985) (arguing that, because agencies are more accountable to the public than the judiciary, agencies deserve deference when operating under broad statutory authority).

4. See Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 830-32 (2003) (outlining the basic argument for strong executive oversight of agency action and noting that proponents of this view argue that such oversight “avoids inconsistencies, redundancies, and unintended consequences in agency rulemaking” and also “ensure[s] that all relevant interests are identified and counted”); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081-82 (1986) (asserting that centralized executive review is desirable because “rulemakers should be accountable to the president before

In its most enthusiastic expression, a presidential model has become a full-blown presidential mystique, in which the special character of chief executive oversight is underscored. The mystique builds on the realities that the President is elected, whereas federal agency officials and judges are not, and that the President's election involves the nation as a whole, whereas Senators represent states and Representatives are elected from districts. Proponents underscore that the President alone has a nationwide constituency, to which he or she is uniquely accountable. In addition, the President is said to be more immune from capture by special interests in the private sector than members of Congress, who live in a hothouse of pork barrel spending for constituents, as well as administrators, who often become dependent on powerful voices in the private sector for political support and information.

The presidential mystique also underscores that the chief executive can act more quickly and effectively than Congress, given the latter's size and need for collective action. Moreover, the President, having the entire executive establishment as a domain of responsibility, is experienced in making tradeoffs among competing programs and policies. In contrast, agencies have more limited subjects of responsibility, and thus have less comprehensive, more parochial perspectives.⁵

Greater accountability to the public, less domination by special interests, greater effectiveness and comprehensiveness in orientation, less parochialism—these are the institutional virtues claimed by the presidency's strongest supporters as its comparative advantages over other governmental institutions.⁶ Given these premises, it is unsurprising that a powerful presidential mystique has arisen.

No doubt, a certain emphasis on the presidency is likely to remain in academic and popular discourse. Respect for the chief executive's energy and uniqueness has a long history in U.S. political thought, dating at least

issuing their rules and should be obliged to demonstrate the costs and benefits of their rules as thoroughly as circumstances permit"). *But see* Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 454-62 (1987) (detailing arguments against increased presidential control including unfaithful execution of the laws, a lack of accountability, concerns about due process and participation, and inconsistency with judicial review); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 HARV. L. REV. 1059, 1064-71 (1986) (arguing against the Office of Management and Budget's (OMB) oversight of agency regulations because of costly delays, the ultimate decisionmaking authority ending up in the hands of OMB personnel, and the insulation of public debate).

5. See COMM'N ON LAW & THE ECON., AM. BAR ASS'N, *FEDERAL REGULATION: ROADS TO REFORM* 73-84 (1979) (explaining that elected officials, like the President, have the requisite overview and coordination to make judgments about competing claims and stand accountable at the polls for the results).

6. See, e.g., *id.* at 76-78 (describing how the President's executive powers give him the ability to oversee administrative officers).

to Alexander Hamilton.⁷ The real question is whether it is time to be somewhat more circumspect about the role of the presidency as the ultimate legitimator of the administrative process. In my view, it is important to inject a note of caution into comparative discussions of presidential attributes.⁸ The basic problem is that the presidential mystique presents a one-sided, overstated picture of executive virtues as well as unduly negative stereotypes of other governmental and non-governmental actors. By seeking a more balanced assessment, we can shape a more realistically interactive picture of the system of checks and balances in which an administration operates.

A richer appreciation of the system of checks and balances is not only a beneficial result of a more balanced appreciation of presidential attributes, but also an affirmative challenge to the critic. “Checks and balances,” frankly, is a concept that many people find unexciting. To be sure, James Madison made much of it,⁹ and our constitutional structure of government is suffused with it. Yet the concept’s longevity is a factor contributing to the difficulty many people have in appreciating it, for the idea of checks and balances often seems old-fashioned. Frequently, it is associated with the problem of a government that does too little to address pressing contemporary needs because it is checked and balanced to death, as it were. In the literature, concerns about stalemate and deadlock appear not infrequently in close juxtaposition to, if not as a direct result of, checks and balances in our structure of government.¹⁰

7. See THE FEDERALIST NO. 70, at 341 (Alexander Hamilton) (Terence Ball ed., 2003) (arguing that such energy in the executive is vital, among other reasons, for “the protection of the community against foreign attacks” as well as “the steady administration of the laws”).

8. For other analyses of the need to be cautious about presidential domination of the regulatory universe, see Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997) [hereinafter Farina, *Against Simple Rules for a Complex World*]; Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161 (1995); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965 (1997) [hereinafter Strauss, *Presidential Rulemaking*]. Professor Strauss has suggested that the advent of electronic rulemaking has increased the influence of the White House through review by the OMB’s Office of Information and Regulatory Affairs (OIRA). “[OMB and OIRA] are the ones creating this new apparatus and to have all information travel through their gateway only adds to the possibilities of their influence. . . .” Richard G. Stoll & Katherine L. Lazarski, *Rulemaking*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE 2003-2004 160 (Jeffrey S. Lubbers ed., 2004) (attributing this portion of the chapter to Professor Strauss). He added that “[a]s agencies become more transparent, they become more transparent to the President as well as to the public. . . . Now the docket is immediately available on equal and easy terms to all who want it, including the President, and politics will give him the incentive to attend to it.” *Id.*

9. See generally THE FEDERALIST NO. 51 (James Madison) (Terence Ball ed., 2003).

10. Add to these factors the existence of certain prejudices against the governmental actors who would receive greater attention if the presidential mystique was seriously questioned. These actors principally include agency officials themselves, the hated bureaucrats for some, as well as members of Congress, breezily referred to by the late John

This Article's thesis is that, while thinking more clearly about the limits of the presidency, we need to adopt a richer vision of checks and balances that sees them as more than merely the guardians of a minimal state or the cause of stalemate. Rather than assume that checks and balances are designed to guarantee an old-fashioned government, we should embrace a newer, more affirmative notion. Checks and balances are central to a deliberative democracy in which the peoples' different viewpoints are shared and debated to arrive at outcomes with broad appeal. No single preference is paramount, and no particular actor should be dominant. The representation of diversity is a key attribute of a well-functioning system of checks and balances. Such a vision calls for continuing criticism of our actual system of governance, requiring ongoing efforts to promote assertive self-government, wide-ranging representation, and deep respect for pluralism. It also critiques tendencies toward narrowing the terms of debate, shutting out contrary perspectives, and ratifying the preferences of a single power center.

This Article will develop these themes in response to a major claim in a recent landmark scholarly portrait of the presidency, Dean Elena Kagan's article, *Presidential Administration*.¹¹ As a compendium of authorities and arguments about the President in the administrative context, Kagan's piece is unparalleled. It whips into shape the presidentialist perspective by giving it wider appeal and stronger grounding than before. Its contribution reflects the author's first-hand experience as a senior legal and policy adviser in the White House during the Clinton Administration.¹² I will discuss its central contention—namely, the argument on behalf of a presumption of statutory interpretation holding that the President simply can direct agency heads to take certain regulatory actions in situations where statutes vest authority to act in agency heads, not the President. To Kagan's credit, while defending presidential directives, she highlights their problematic status in light of what she acknowledges to be the contrary traditional view of the President's role vis-à-vis agencies.

This Article will proceed in three parts. Part I will lay out the traditional view. Part II will sketch Elena Kagan's model of presidential administration during the Clinton Administration, which rejects the traditional view. Part III will critique Kagan's arguments against the

Hart Ely as "clowns." JOHN HART ELY, *DEMOCRACY AND DISTRUST* 134 (1980). The presidential mystique is founded on the belief that administrative law discourse should pay particular attention to the head of state and head of government, united in the office of the President, rather than to bureaucrats and clowns. *Id.*

11. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

12. Dean Kagan served as Associate Counsel to the President from 1995 to 1996 and as Deputy Assistant to the President for Domestic Policy and Deputy Director of the Domestic Policy Council from 1997 to 1999.

traditional view, which turn on claims about legislative intent and institutional competence. When the discussion focuses on matters of institutional competence, the presidential mystique comes into full flowering.

I. THE TRADITIONAL VIEW

In this Part, I will discuss the traditional view of presidential power vis-à-vis agencies in regulatory matters. The traditional view holds that although the President can supervise and guide agency policymaking, the President cannot go so far as to displace the agency head's discretion to make decisions vested in that officer by law.¹³ That is, the President cannot simply command or direct an agency head to issue a regulation, so long as the relevant statute vests authority to regulate in the agency head.¹⁴ Rather, the agency head must exercise his or her own discretion in accepting the President's direction, assuming the action complies with statutory limits. For example, the agency head must actually decide to promulgate a regulation with the provision in question, thereby turning the President's advice into the agency's policy. Alternatively, the President can take the not entirely cost-free step of firing a recalcitrant agency head, assuming he or she is dealing with an at-will executive officer.¹⁵ Again, what the President cannot do is merely assume that his or her own will is necessarily controlling when the statute vests regulatory authority in an agency head.

It should be clear that, as a matter of practice, Presidents commonly tell agencies what they want them to do. The traditional understanding sees these statements as expressions of the President's priorities, not as

13. At the outset of her article, Dean Kagan highlights the "serious legal questions" that her challenge to the traditional view of agency head power raises. Kagan, *supra* note 11, at 2250. She describes the traditional view as follows:

The conventional view further posits, although no court has ever decided the matter, that . . . Congress can insulate discretionary decisions of even removable (that is, executive branch) officials from presidential dictation—and, indeed, that Congress has done so whenever (as is usual) it has delegated power not to the President, but to a specified agency official.

Id.

14. For support of the traditional view, see Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 25 (1995) ("[T]he President has no authority to make the decision himself, at least if Congress has conferred the relevant authority on an agency head."); Thomas O. Sargentich, *The Administrative Process in Crisis: The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. AM. U. 710, 716 (1993) ("[T]he power to regulate remains where the statute places it: the agency head ultimately is to decide what to do."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 649-50 (1984) (explaining that "the agencies to which rulemaking is assigned," rather than the President, possess "ultimate decisional authority").

15. See Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1141-44 (2000) (explaining the President's power, with some exceptions, to remove federal officials).

attempted displacements of agency head discretion. At the same time, the White House has on hand many tools of persuasion. At bottom, the traditional view holds in reserve a qualification on presidential power: The President cannot simply say to agency heads, “Regulate in this lawful way because I direct you to do so,” and assume that the direction will be controlling by itself, so long as an agency head has the relevant regulatory authority under a statute.

There is no developed body of judicial case law elaborating the traditional view, for it operates in the background of intra-executive branch deliberations.¹⁶ Yet, the Department of Justice embraced it in its 1981 memorandum validating the Reagan Administration’s initial Executive Order on regulatory review.¹⁷ It also has been affirmed in the literature and is widely thought to be valid, as Kagan’s descriptive phrases “conventional view” and “generally accepted view” indicate.¹⁸

Of course, for numerous reasons, the likelihood that many agency heads will be willing to disregard presidential suggestions is limited. Presidential appointees naturally have a certain loyalty to the chief executive, and they presumably are in agreement with the President on matters of policy. Moreover, if an agency head desires a higher or different position that would require another presidential nomination, it is critical to stay on the good side of White House officials. Even if an appointee is tempted to negotiate strongly with the White House on a particular issue, the reality is that the President can remove an executive agency head for any reason.¹⁹ To be sure, the actual firing of a recalcitrant executive agency head raises the costs to the President of getting his own way. 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.²⁰

16. At the same time, Dean Kagan acknowledges that “the courts never have recognized the legal power of the President to direct even removable officials as to the exercise of their delegated authority.” Kagan, *supra* note 11, at 2271.

17. Proposed Executive Order Entitled “Federal Regulation,” 5 Op. Off. Legal Counsel 59, 61 (1981) [hereinafter OLC Opinion] (explaining that Presidential supervision, though grounded in constitutional and implied statutory authority, is not limitless and is more justifiable in situations in which the authority of a subordinate official is simply guided or limited rather than wholly displaced).

18. Kagan, *supra* note 11, at 2250 & n.8 (referring to the conventional view and the generally accepted view of presidential power); see also James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 DUKE L.J. 851, 852 (2001) (“[I]t appears we are all (or nearly all) Unitarians now.”).

19. See Breger & Edles, *supra* note 15, at 1141-44 (outlining the progression of the Supreme Court’s position on the President’s authority to remove appointees).

20. Needless to add, a pattern of firing senior officials also can make it difficult to recruit excellent candidates for office.

Yet, as Elena Kagan recognizes by giving the traditional view prominence in her discussion, it is not safe to assume that the view never will be important. There is always a possibility that an agency head might disagree sharply with the White House on some issue of special importance to the agency. Despite the costs involved, an agency head might be willing to signal dissent in a way that creates ill will toward the agency on the part of some people in the White House.

The traditional view would seem to be of greatest importance not in situations involving the President directly, but rather in negotiations with the White House staff, including the Office of Management and Budget (OMB). As with most large organizations, exchanges with the top office usually come in the form of interactions among senior staff. It does not require much imagination to see that agency heads can more easily invoke the traditional understanding in disagreeing with White House staff than in disagreeing with the President. It is not only easier to negotiate with White House staff but, in some circumstances, it would be expected. The key point is that, by insisting that he or she has the relevant regulatory authority, an agency head may gain greater space in bargaining for a position at odds with that desired by White House staff. Power relations can be subtly but distinctly affected by background norms like the traditional understanding.

Moreover, the traditional view should matter to outsiders who wish to critique what an agency has done. If it is clear that an agency head cannot just say, “The President made me do it,” then the agency has to take responsibility for its policy decision. Outside critics in Congress, the media, and the public can more effectively hold the agency head’s feet to the fire if they are drawing on assumptions built into the traditional understanding.

As a legal matter, the traditional understanding rests on the plain language that Congress employs in typical delegations of regulatory authority. A statute normally provides that the head of an agency is authorized to take action.²¹ The text is controlling here, as is the usual case.²²

Also, the structural realities underlying the creation of agencies support such a plain-language reading. Congress, by law, creates an agency in response to political pressures in an area of concern. For example, when

21. See, e.g., 42 U.S.C. § 7601(a)(1) (2000) (“The [EPA] Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.”).

22. See Strauss, *Presidential Rulemaking*, *supra* note 8, at 984 (“In the text both of the Constitution and of Congress’s statutes, it is the heads of departments who have legal duties vis-à-vis regulatory law. The President can ask about those duties and see that they are faithfully performed, but he and his department heads are to understand that the duties themselves are theirs. . .”).

the Department of Homeland Security was created by combining functions that had been dispersed in several agencies of government, Congress acted in response to political pressures to deal in a visible, institutional way with threats to the homeland following the terrorist actions of September 11, 2001. When Congress gives specific regulatory authority to an agency it creates, it confirms that this is the entity responsible for the functions under discussion.

The traditional understanding also finds support from legislative purpose, precedent, and pragmatic considerations. The purpose of Congress can be inferred from what Congress actually does, which is to vest discretion in an agency head. If Congress had wanted the President to have controlling authority, it could have so provided.²³ The precedents of relevance are those resting on the traditional understanding, including Department of Justice opinions and behavior reflecting the standard view itself.²⁴ The pragmatic considerations have to do with the apparent consequence of dropping the traditional view. It seems inconsistent to create a particular agency to deal with a problem and, at the same time, to overcome the agency's role by giving the President power to decide what the agency will do. Moreover, as I will discuss below, the traditional view rests on a conception of checks and balances that is non-presidentialist in orientation.

23. See Croley, *supra* note 4, at 837 (“[B]y most acts of delegation Congress intends for agencies to apply *their* expertise in the course of exercising their discretion. Where instead Congress wants the president to have influence over particular decisions that agencies make, as opposed to agenda-setting influence in ordering their statutory priorities, Congress can so indicate by specifically delegating power to a White House agency. But in the normal course, Congress delegates regulatory power to agencies so that agencies, not the President, can exercise that power.”); see also Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1008 (2001) (pointing out that “there are some circumstances in which Congress has specified that the legal effects of certain decisions entrusted to agency heads may be suspended by the president upon a finding of some sort of national emergency”). Percival argues that “[i]f the president has express authority to overturn the legal consequences of agency decisions in some circumstances, but not others, the argument for inferring congressional intent to permit the president generally to displace agency decisions is somewhat weaker.” *Id.*

24. Peter Strauss points out that, in a somewhat different context, President Nixon's asking his Attorney General to fire Archibald Cox, the original Watergate special prosecutor, confirms that Nixon did not consider the Attorney General “the mouthpiece of the President, with no independent duties of his own. . . .” Strauss, *Presidential Rulemaking*, *supra* note 8, at 973. Neither did the Attorney General or Deputy Attorney General—who became Acting Attorney General—both of whom refused to fire Cox and subsequently resigned instead. The events of the Saturday Night Massacre “are sharply inconsistent with the proposition that the President's sole possession of constitutional ‘executive power’ means that any responsibility assigned to an executive department is his, and that he may exercise it.” *Id.* at 974.

II. PRESIDENTIAL ADMINISTRATION DURING THE CLINTON YEARS

In this Part, I will discuss Dean Kagan's model of presidential administration during the Clinton Administration, which rejects the traditional view. Kagan begins by noting that, at different times, various entities, public and private, have had comparative primacy in establishing the direction and outcome of the administrative process, and "[i]n this time, that institution is the Presidency. We live today in an era of presidential administration."²⁵ Presidential administration "expanded dramatically during the Clinton years," with the result that agency regulatory activity became "more and more an extension of the President's own policy and political agenda."²⁶

As Kagan acknowledges, the outlines of presidential administration began to emerge "sometime around 1980."²⁷ The critical forerunner was President Reagan's 1981 Executive Order on regulatory review, No. 12,291, which required executive agencies to submit to OMB's Office of Information and Regulatory Affairs any proposed major rule, accompanied by a "Regulatory Impact Analysis."²⁸ The Executive Order outlined criteria to govern the regulatory analysis. To "the extent permitted by law," an agency could regulate only if the benefits of doing so exceeded the costs and if the chosen alternative "involv[ed] the least net cost to society."²⁹ This 1981 Order was accompanied four years later by Executive Order No. 12,498, which required each agency to submit for review an annual regulatory plan listing proposed actions.³⁰

The regulatory review experience during the Reagan Administration³¹ and the first Bush presidency provide the background for Clinton-era developments. A 1993 Clinton Executive Order on regulatory review, No. 12,866, replaced the Reagan Orders while retaining key features of the earlier review system.³² In particular, the Clinton Order retained OMB

25. Kagan, *supra* note 11, at 2246.

26. *Id.* at 2248.

27. *Id.* at 2253.

28. Exec. Order No. 12,291, § 3, 3 C.F.R. 127, 128-30 (1981), *reprinted in* 5 U.S.C. § 601 (1994).

29. *Id.* § 2, 3 C.F.R. at 128.

30. Exec. Order No. 12,498, § 2, 3 C.F.R. 323, 324 (1985) (repealed 1993).

31. Elena Kagan writes that during the Reagan Administration, "roughly eighty-five rules each year were either returned to the agencies for reconsideration or withdrawn by the agencies in the course of review." Kagan, *supra* note 11, at 2278. Although that sum amounted to a small percentage of all reviewed rules, the group included many of the most important rules. *Id.* For a discussion of presidential review of agency rules during the Reagan Administration, see DeMuth & Ginsburg, *supra* note 4, at 1075-76; McGarity, *supra* note 4, at 443-44; Morrison, *supra* note 4, at 1063.

32. In an important respect, the Clinton Order was distinctive because it provided for presidential decisions to resolve disputes among agencies or between an agency and OMB. See Exec. Order No. 12,866, § 7, 3 C.F.R. 638, 648 (1993), *reprinted in* 5 U.S.C. § 601

review of major rules in the terms of cost-benefit analysis.³³ It also embraced an annual regulatory planning process. On the other hand, the Clinton Order limited the time available for OMB review,³⁴ and it softened the requirement of quantitative cost-benefit studies by referring to considerations of “equity,” “distributive impacts,” and “qualitative measures.”³⁵ Furthermore, the Clinton Order substantially opened up the centralized review process to public view and comment.³⁶

Kagan stresses that, unlike the Reagan Administration’s efforts to reduce regulation, Clinton-era regulatory supervision had a “distinctly activist and pro-regulatory governing agenda.”³⁷ Clinton thus appropriated the presidential mantle for those drawn to the positive uses of administrative power.³⁸ At the front-end of the regulatory process, the Clinton-era transformation consisted of “formal directives to the heads of executive agencies to set the terms of administrative action and prevent deviation from his proposed course.”³⁹ At the back-end of the process, President

(1994) (providing that such disputes were to be resolved to the extent permitted by law “by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials)”). Dean Kagan notes that a later provision more clearly indicated that the President will decide a matter in contest: “At the end of this review process, the President, or the Vice President acting at the request of the President, shall notify the affected agency . . . of the President’s decision with respect to the matter.” Kagan, *supra* note 11, 2288-89 (quoting Exec. Order No. 12, 866, § 7, 3 C.F.R. at 648). As a theoretical matter, Kagan stresses that the foregoing language presumes that the President is to make a final decision regarding a regulatory matter, regardless of a statutory delegation of rulemaking authority to an agency head; as a practical matter, she notes, the procedure made little difference during the Clinton Administration. *Id.* at 2289. She reports that the Administrator of OIRA from 1993 to 1998, Sally Katzen, could recall only one occasion in which a dispute between OMB and an agency went to the President as contemplated by this provision. *Id.* at 2289 n.174.

33. Exec. Order No. 12,866, §§ 2(b), 6(a)(3)(B), 3 C.F.R. 640, 645.

34. *Id.* § 6(b)(2), 3 C.F.R. at 646-47.

35. *Id.* § 1(a), 3 C.F.R. at 639.

36. Under the Clinton Order, only the Administrator of the OIRA could receive oral communications from persons outside of the executive branch, and agency officials had the right to be present at such meetings. *Id.* § 6(b)(4)(A)-(B)(i), 3 C.F.R. at 647. Moreover, OIRA was to forward all written communications from outsiders to the agency in question and maintain a public log of all written and oral communications about a rule under review. *Id.* §§ 6(b)(4)(B)(ii), 6(b)(4)(C), 3 C.F.R. at 647-48. Also, after publication of the regulation or a decision not to go forward with it, OIRA must disclose all written communications between itself and the agency. *Id.* § 6(b)(4)(D), 3 C.F.R. at 648.

Dean Kagan defends the Clinton-era practice of issuing regulatory directives with a degree of transparency, enabling the public and politically active groups to know what was going on. *See* Kagan, *supra* note 11, at 2331-33. In contrast, she criticizes the Reagan Administration’s tendency toward secrecy, suggesting that “President Reagan usually tried . . . to veil his and his staff’s influence over administration.” *Id.* at 2333. After drawing this contrast, Dean Kagan notes that she is not claiming that Clinton always sought transparency or that he “never influenced agency decisions in ways designed to avoid leaving fingerprints. . . .” *Id.*

37. Kagan, *supra* note 11, at 2249.

38. *See id.* at 2341-44 (exploring the pros and cons of administrative “activism,” a concept that implies “the imposition of a coherent regulatory philosophy across a range of fields to produce novel regulatory (or for that matter deregulatory) policies”).

39. *Id.* at 2249.

Clinton “personally appropriated significant regulatory action through communicative strategies that presented regulations and other agency work product . . . as his own”⁴⁰ In implementing this system, “the White House in large measure set the administrative agenda for key agencies”⁴¹

Kagan notes that Clinton’s own directives about regulations usually were not deployed within the regular OMB review system, but rather were outside of it.⁴² She also points out that the number of Clinton’s directives increased each year after the Democrats lost control of Congress in 1994.⁴³ She avers that President Clinton issued 107 directives to executive agencies about regulatory policy.⁴⁴ Through the use of directives, President Clinton “effectively placed himself in the position of a department head. . . .”⁴⁵ The President “ordered and announced the issuance of proposed regulations” for comment as well as “the issuance of final regulations” after the comment period.⁴⁶ Moreover, the President ordered and announced—“just as a department head might”⁴⁷—agency action through guidance documents, policy statements, and the like.⁴⁸

40. *Id.*

41. *Id.* at 2248.

42. *See id.* at 2294 (pointing out that Clinton added a scheme for direct presidential intervention in particular regulatory matters to the system of presidential oversight).

43. *Id.* at 2312-13; *see* Timothy J. McKeown, “*Micromanagement*” of the U.S. Aid Budget and the Presidential Allocation of Attention, 35 PRESIDENTIAL STUD. Q. 319, 324-25 (2005) (citing Kagan and noting that presidential micromanagement of foreign aid budget matters also varied depending on “macrolevel phenomena in national and international politics”).

44. *See* Kagan, *supra* note 11, at 2294. Clinton’s closest advisors and Clinton himself saw such directives as “a central part of his governing strategy. . . .” *Id.* at 2295. Once the President issued a directive, White House staff monitored the agency “to ensure that agency officials complied in a timely and effective way with the directive’s terms and exercised any discretion left to them consistently with its objectives.” *Id.* at 2298.

45. *Id.* at 2306.

46. *Id.*

47. *Id.*

48. Although Dean Kagan’s article was published in the early months of the second Bush Administration, she suggests that the new President is likely to carry over elements of Clinton’s methods of control. *See id.* at 2318-19 (“[E]arly indications suggest that Clinton’s methods of control will join Reagan’s in Bush’s arsenal”). She also predicts that there will be continuing “expansion of presidential administration” for example, as chronicled in her article. *Id.* at 2319. Indeed, this has come to pass with OMB’s issuance of a far-reaching and controversial “Peer Review Bulletin” on December 16, 2004. *See* Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664, 2664 (Jan. 14, 2005) (providing guidance “designed to realize the benefits of meaningful peer review of the most important science disseminated by the Federal Government”); OMB, EXECUTIVE OFFICE OF THE PRESIDENT, PROPOSED BULLETIN FOR GOOD GUIDANCE PRACTICES 1 (2005), http://www.whitehouse.gov/omb/inforeg/good_guid/good_guidance_preamble.pdf (proposing practices “to increase the quality and transparency of agency guidance practices and the guidance documents produced through them”); Press Release, OMB, Executive Office of the President, OMB Releases Draft Bulletin for Good Guidance Practices (Nov. 23, 2005), *available at* <http://www.whitehouse.gov/omb/pubpress/2005/2005-30.pdf> (announcing OMB’s proposed bulletin on good guidance).

In short, regulatory oversight during the Clinton Administration took a new substantive turn: “President Clinton treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done.”⁴⁹ The President sought not only to influence but also to mandate the content of agency initiatives, including notice-and-comment rules and more informal means of policymaking. As Kagan writes, “President Clinton’s principal innovation in the effort to influence administrative action lay in initiating a regular practice . . . of issuing formal directives to executive branch officials regarding the exercise of their statutory discretion”⁵⁰

The foregoing description makes clear that, from the perspective of the Clinton White House, there basically was nothing left of the traditional view of the President’s role vis-à-vis agencies. In practice, the line between strong efforts at persuasion and actual commands by the President can be a fine one.⁵¹ Yet “a line remains,” and by so often using directives, “President Clinton crossed from one side of it to the other.”⁵²

Perhaps out of concern that some might consider her position too extreme, Dean Kagan distinguishes her interpretation from that of “unitarian” executive branch theorists of the 1980s and 1990s.⁵³ To be sure, on several grounds the two models are similar. Both emphasize the President as a unique, democratic force for disciplining the use of

49. Kagan, *supra* note 11, at 2281.

50. *Id.* at 2293.

51. *See id.* at 2298 (describing how politics and compromises lead to a line between command and persuasion that is, at times, hard to ascertain).

52. *Id.*

53. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 550 (1994) (arguing that the founders of the Constitution fully embraced the “myth” of a chief administrator empowered to administer all federal laws); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) (stating that unitary executive theorists believe that the Vesting Clause of Article II mandates “a hierarchical, unified executive department under the direct control of the President”); Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 349-52 (1989) (discussing the theory of the unitary executive in the context of the Supreme Court’s 1988 decision that upheld the constitutionality of the independent counsel statute); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44 (arguing that, under the Constitution, Congress cannot deny the President removal power of a policymaking official who has refused a presidential order); Theodore Olson, *Founders Wouldn’t Endorse America’s Plural Presidency*, LEGAL TIMES, Apr. 17, 1987, at 11 (suggesting that the current “plural presidency” is the antithesis of the intent expressed by the framers of the Constitution for who should have the power to enforce the laws); David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 309-10 (1993) (setting forth an argument that one does not have to abandon the original intent of the constitutional Framers to conclude that the President has oversight of all regulatory activities conducted by executive agencies). *But see* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 118 (1994) (concluding that the theory of the “unitary executive” is a twentieth century creation, not the original intent of the Framers of the Constitution).

regulatory discretion. Under both, the President's disciplinary tools include the appointment of agency heads with backgrounds and philosophies congruent with the President's, as well as the oversight of agency budgets, legislative proposals, and testimony before Congress. Under both approaches, aggressive presidential oversight is justified on the premise that when the President guides agencies, he applies the values that the electorate has presumably validated.

The chief point of distinction between the perspective of Dean Kagan and unitarian executive branch theorists involves the constitutionality of independent regulatory agencies. The authorizing statutes of such agencies, among other things, limit presidential authority to remove the agency heads,⁵⁴ providing for their removal only for inefficiency, neglect of duty, or malfeasance in office. Unlike such officials, *executive* agency heads can be removed by the President for any reason, or at will.⁵⁵ The unitarian theorists argue that constraining the President's ability to remove any agency heads offends the constitutional text, structure, and original intent.⁵⁶

This attack on independent agencies generated strong reactions from commentators defending Congress's authority to establish agencies having more independence from the President than typical executive agencies.⁵⁷

54. For a discussion of independent agencies, see Breger & Edles, *supra* note 15, at 1141-44.

55. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935) (upholding a "for cause" removal provision in a statute dealing with an independent regulatory agency); see also *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (upholding the independent counsel statute); *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986) (analyzing the constitutional status of Comptroller General in terms of the removal provision); *Myers v. United States*, 272 U.S. 52, 114 (1926) (upholding the President's power of removal at will of purely executive officers).

56. See, e.g., Calabresi & Rhodes, *supra* note 53, at 1167-68 (defining the unitarian theory regarding the Vesting Clause, the Necessary and Proper Clause, and the Take Care Clause).

57. See Farina, *Against Simple Rules for a Complex World*, *supra* note 8, at 989-93 (challenging the notion that the President is uniquely positioned to hear the will of the people); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 227 (1998) [hereinafter Farina, *The New Presidentialism*] (stating that presidentialism is "a profoundly anti-regulatory phenomenon"); Cynthia R. Farina, *The 'Chief Executive' and the Quiet Constitutional Revolution*, 49 ADMIN. L. REV. 179, 179 (1997) (describing the dangers and developments of presidentialism, or the "cult of the Chief Executive"); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1788-92 (1996) (concluding that history does not support the current doctrine of a unitary executive); A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1347 (1994) (asserting that a proper structural analysis of the Constitution emphasizes a "balance between Congress's role in structuring the executive and the President's inherent and default powers"); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 128 (1994) (defending Congress's regulation of presidential action by noting the need for a restoration of a proper system of checks and balances); Shane, *supra* note 8, at 213-14 (concluding that, by allowing agencies to remain attentive to multiple parties and not just the executive, there will be a proper amount of accountability); see also Percival, *supra* note 23, at 966

Underlying these critiques of unitarian presidentialism⁵⁸ is a commitment to active checks and balances between the legislative and executive branches, according to which neither branch should be exalted.

Although still a presidentialist, Kagan herself disagrees with the unitarian view that independent agencies and officers are unconstitutional.⁵⁹ She posits that Congress can, if it wants to, limit presidential control over administration.⁶⁰ The key requirement is that Congress needs to be explicit in constraining the President's power to control the heads of such agencies.⁶¹

Dean Kagan advances two main arguments in rejecting the constitutional critique of independent agencies. First, she does not consider that the Constitution's text, structure, and original intent are sufficiently clear to establish that the President has broad control over all execution of the law.⁶² This is true, she argues, because of imprecision in the mandate of Article II, the fact that there has been great change in the field of presidential power, and the difficulty of reversing decades of practice by governmental institutions. Second, she does not believe that the Supreme Court is likely to abandon its decisions on the President's removal power that uphold the constitutional validity of independent agencies and officers.⁶³

(asserting that, while the President has enormous power to influence agency heads' decisions because of the presidential removal power, this does not give the chief executive the authority to dictate substantive decisions); Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 49-50 (1994) [hereinafter Seidenfeld, *A Big Picture Approach to Presidential Influence*] (arguing that the President should not micro-manage agency policy decisions but rather use a "big picture approach" to influence agency policy more effectively); Sidney A. Shapiro, *Political Oversight and the Deterioration of Regulatory Policy*, 46 ADMIN. L. REV. 1, 6 (1994) (noting that Congress can limit the President's removal authority for independent agencies).

58. The term presidentialism has been used to refer to 1980s and 1990s unitary presidentialists. See Farina, *The New Presidentialism*, *supra* note 57, at 227 (defining the term presidentialism as "the unitary executive thesis"). I use the term more broadly to include Dean Kagan's views and will be more specific when referring to unitary presidentialists.

59. See Kagan, *supra* note 11, at 2326.

60. *Id.* (noting that Congress usually assigns "discretionary authority to an agency official, without in any way commenting on the President's role in the delegation . . .").

61. See Kagan, *supra* note 11, at 2251 ("I accept Congress's broad power to insulate administrative activity from the President . . ."); *id.* at 2320 ("I acknowledge that Congress generally may grant discretion to agency officials alone and that when Congress has done so, the President must respect the limits of this delegation."); *id.* at 2326 ("I do not espouse the unitarian position in this Article, instead taking the Supreme Court's removal cases, and all that follows from them, as a given."); see also Blumstein, *supra* note 18, at 875 (agreeing with Kagan's reading of the cases as providing a basis for insulating independent agencies from presidential administration).

62. See Kagan, *supra* note 11, at 2326 (attacking the unitarian claim that plenary control is a constitutional mandate).

63. See *id.* (arguing that any framework attempting to explain presidential-agency relations must incorporate these holdings and their broader implications as part of its framework).

Dean Kagan not only endorses the constitutionality of explicit congressional restrictions on presidential power to remove particular agency heads, but concludes that her suggested statutory presumption in favor of presidential direction over agency action, discussed below, logically would not apply when such congressional restrictions have been imposed so as to turn an agency into an independent regulatory body.⁶⁴ Thus, Kagan is more supportive of the autonomy of independent regulatory agencies than are unitarian theorists, even while she aggressively embraces the President's interests in seeking to jettison the traditional view of presidential power vis-à-vis executive agencies.⁶⁵

III. THE ARGUMENT AGAINST THE TRADITIONAL VIEW

Elena Kagan's critique of the traditional view rests on the notion that Congress has not specifically ruled out presidential directives to agencies. To oppose directives, one has to draw a negative inference from the assignment of regulatory authority to an agency. It is reasonable, Kagan contends, to adopt a presumption, as a matter of statutory interpretation, that when Congress assigns regulatory authority to an agency, it does so with an understanding contrary to the traditional view—namely, with an understanding that the President can direct the agency's regulatory behavior.⁶⁶

A. Arguments Based on Legislative Intent

In this Section, I will consider arguments that go to the question of Congress's intent in enacting statutes that assign regulatory authority to agencies.

1. Traditional View Not Necessary or Logically Compelled

Kagan advances a pair of arguments to the effect that the traditional view is not necessary or logically compelled by statutory language. To begin, one might say that Congress's assignment of authority to an agency head represents the inevitable or necessary denial of directive power to the President based on the maxim of statutory construction, *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of

64. See *id.* at 2323 (declaring that, where Congress has imposed such a restriction, "the limit on the President's directive power seems but a necessary corollary: a for-cause removal provision would buy little substantive independence if the President, though unable to fire an official, could command or, if necessary, supplant his every decision").

65. See *id.* at 2320 (urging that "most statutes granting discretion to executive branch—but not independent—agency officials should be read as leaving ultimate decisionmaking authority in the hands of the President").

66. See *id.* (specifying that when Congress delegates regulatory authority to an executive agency, it delegates discretionary power to the President).

another”).⁶⁷ Kagan points out that this maxim needs to be applied with great caution.⁶⁸ As one commentator has stated, the *expressio unius* maxim “is a questionable one in light of the dubious reliability of inferring specific intent from silence.”⁶⁹ Just because Congress mentioned an agency head’s regulatory authority does not mean that it necessarily precluded presidential directives to the agency.

Another defense of the traditional view rests on the premise that Congress knows how to delegate power to the President in the regulatory sphere, as it has done so in various ways. Because Congress did not delegate directive power to the President in the statutes given meaning under the traditional view, it arguably chose not to delegate such power to the President.

Dean Kagan responds to this argument by insisting that it is not illogical for Congress both to delegate regulatory power to agencies and to allow presidential directives.⁷⁰ Yet, the fact that an interpretation is not logically compelled does not mean that it is not persuasive. After all, Congress does not explicitly address presidential power over agencies in the statutory language in question, so the most one could do is provide a persuasive case. Thus, the real battle does not hinge on what is logically compelled.

In rejecting the *expressio unius* argument, Kagan tips her hand about the hierarchical universe, with the President firmly on top, that she imagines as the model for agency oversight. She sees as analogous to an agency head’s role the position of a Navy captain who makes decisions about a ship’s

67. See *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763, 770 (W. Va. 1995) (“*Expressio unius est exclusio alterius* (express mention of one thing implies exclusion of all others) is a well-accepted canon of statutory construction.”). The *expressio unius* maxim is premised upon an assumption that certain omissions are intentional. As the court explained in *Riffle*, “[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.” *Id.*

68. See Kagan, *supra* note 11, at 2328 n.322 (citing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 229 (1994), CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 151-52 (1990), and *Ill. Dep’t of Pub. Aid. v. Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983), all of which cite to the phrase *expressio unius est exclusio alterius*, which equates statutory silence with denial of power, but may create erroneous statutory interpretation).

69. Cass R. Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071, 2109 n.182 (1990); see also Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873-74 (1930) (calling the canon “one of the most fatuously simple of logical fallacies, the ‘illicit major,’ long the *pons asinorum* of schoolboys”) (internal citation omitted). Thus, as the Seventh Circuit Court of Appeals succinctly observed, “Not every silence is pregnant; *expressio unius est exclusio alterius* is therefore an uncertain guide to interpreting statutes” *Ill. Dep’t of Pub. Aid.*, 707 F.2d at 277 (citations omitted).

70. See Kagan, *supra* note 11, at 2329-30 (“Only if Congress sometimes stipulated that a delegation of power to an agency official was subject to the ultimate control of the President—which Congress has not, to my knowledge—would a claim of this kind (that is, a claim relying on the negative implication of other statutes) succeed in defeating my argument.”).

operation. She writes that few would think of the Navy captain as being free from a direct superior's power to give instructions to the captain "as to matters within the delegation."⁷¹

Yet we are not dealing with military personnel, and we should wonder whether the military is an apt analogy. The analogy begs the question whether there is a fully hierarchical relationship between the President and agency heads, or whether Congress should be understood to have created some space for agency discretion under law that is not subject to plenary presidential direction and displacement. That is the issue to resolve, not a point to assume.

2. *Traditional View Not Realistic*

To respond to the claim that the traditional view is persuasive, Kagan suggests that the President has so much power over executive agencies that it is most realistic to envision Congress as allowing presidential directives. First, the President nominates officers of the United States "without restriction";⁷² second, the President can remove them at will; and third, the President "can subject them to potentially far-ranging procedural oversight."⁷³ These points are generally accepted by supporters of the traditional understanding.⁷⁴

If one accepts that the President has these three powers, Kagan argues, it is realistic to suppose that Congress also allows the President to have a fourth power—namely, directive authority to control regulatory decisions.⁷⁵ Because the President can exercise procedural review of agency rules, "[a]n interpretive principle presuming an undifferentiated presidential control of executive agency officials" that includes procedural *and* substantive review "may reflect, more accurately than any other, the general intent and understanding of Congress."⁷⁶ Moreover, the "very subtlety" of the line between *influence* through appointment, removal, and procedural oversight

71. *Id.* at 2329.

72. *Id.* at 2327.

73. *Id.*

74. See Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200 (1986) (substantiating the argument that Presidents have power over executive agencies by stating that the executive power to control and supervise has two components: (1) to consult with and demand answers from officials, and (2) to exercise authority in coordinating and overseeing the operating of the executive branch).

75. Kagan, *supra* note 11, at 2327-28 (advancing the argument that Congress knows that executive officials will give deference to presidential opinions, and therefore, by delegating to executive officials, Congress is delegating to the President).

76. *Id.* at 2328.

and *command* over the substance of regulatory action “provides reason to doubt any congressional intent to disaggregate them, in the absence of specific evidence of that desire.”⁷⁷

This argument takes advantage of our modern awareness of the manipulability of legal categories between procedural and substantive constraints on power. If the former are allowed, why not the latter? In addition, the argument calls into question the line between presidential influence and control, claiming that the distinction is too fine to be imputed to Congress.

Despite the difficulty of distinguishing procedural and substantive constraints on power, it is a familiar distinction. 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. One need not accept all the procedural limits imposed by the President while rejecting all the substantive ones imposed by the President.

This point is confirmed in the 1981 opinion by the Office of Legal Counsel (OLC) of the Department of Justice (the OLC Opinion) validating the first Reagan Executive Order (the Order) on regulatory review.⁷⁸ This opinion invokes the distinction between procedural and substantive directives to agencies. In particular, it considers that the requirement of preparing a regulatory impact analysis of proposed and final rules is procedural in nature.⁷⁹ The opinion raises no serious objection to this requirement on the ground that it is “at most an indirect constraint on the exercise of statutory discretion.”⁸⁰

Yet the OLC Opinion also notes that the Reagan Order contains substantive requirements, which it examines more closely.⁸¹ In particular, it notes that the Order’s cost-benefit analysis requirement is “substantive” in character.⁸² Assuming that authorizing statutes do not bar agencies from performing cost-benefit analyses, the OLC Opinion reasons that the key legal issue is “whether . . . the President may require executive agencies to

77. *Id.*

78. OLC Opinion, *supra* note 17, at 59.

79. *See id.* at 59-60.

80. *Id.* at 62. Also, the requirement of reporting an analysis to the White House can be justified on the basis of the Opinion Clause, which empowers the president to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . .” U.S. CONST. art. II, § 2, cl. 1; *see also* Strauss & Sunstein, *supra* note 74, at 197 (stating that the Opinion Clause of the Constitution implies that the President can demand reports from agency heads in a particular form, but it does not imply directory authority).

81. *See* OLC Opinion, *supra* note 17, at 62 (“The order would impose requirements that are both procedural and substantive in nature.”).

82. *See id.* at 63 (“Substantively, the order would require agencies to exercise their discretion, within statutory limits, in accordance with the principles of cost-benefit analysis.”).

be guided by principles of cost-benefit analysis even when an agency, acting without presidential guidance, might choose not to do so.”⁸³ The OLC Opinion analyzes this issue in terms of the traditional legal view that the President cannot displace an agency head’s discretion. It notes that cost-benefit analysis leaves “a considerable amount of decisionmaking discretion to the agency.”⁸⁴ Notably, the agency head remains responsible for calculating a rule’s projected costs and benefits and for ascertaining whether the benefits exceed the costs. With such “considerable latitude” in decisionmaking left to the agency, the Order’s “limited requirements” are not “inconsistent with a legislative decision to place the basic authority to implement a statute in a particular agency.”⁸⁵ Accordingly, the Order’s cost-benefit analysis requirement is acceptable because it does not “displace the relevant agencies in discharging their statutory functions. . . .”⁸⁶

The reality-based critique of the traditional view presumes that there is no meaningful distinction between presidential influence on, and control of, agencies. To be sure, studies of the presidency have recognized that the 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.⁸⁷ The line, like many others, is not easy to draw.

Nonetheless, the basic distinction has content. It makes sense to say as a general matter that when a statute confers statutory authority on an agency head, the use of the authority should not be utterly displaced by the President. Consider in this regard the list of actions that centralized White House reviewers can and cannot do under the traditional view as suggested in the 1981 OLC Opinion. Centralized White House reviewers can, for instance, call for “the supplementation of factual data, the development and implementation of uniform systems of methodology, the identification of incorrect statements of fact, and the placement in the administrative record of a statement disapproving agency conclusions”⁸⁸ All of this is seen

83. *Id.*

84. *Id.*

85. *Id.*; see also Strauss & Sunstein, *supra* note 74, at 201 (“But in view of the breadth of agency discretion in deciding on costs and benefits, and in making the ultimate trade-off, there is, in our view, no serious question about the facial legality of the order. This conclusion is buttressed by the various disclaimers in the order of any authority to displace delegated decisionmaking power.”).

86. OLC Opinion, *supra* note 17, at 63.

87. See RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 10 (1960) (“Presidential *power* is the power to persuade.”) (emphasis in original); *id.* at 32 (“Truman is quite right when he declares that presidential power is the power to persuade. Command is but a method of persuasion, not a substitute and not a method suitable for everyday employment.”).

88. OLC Opinion, *supra* note 17, at 64.

as requiring discussion or disclosure by the agency in a manner that leaves intact the agency's ultimate regulatory authority. However, the supervisory and consultative role of centralized White House reviewers does not include authority to "reject an agency's ultimate judgment, delegated to it by law, that potential benefits outweigh costs, that priorities under the statute compel a particular course of action, or that adequate information is available to justify regulation."⁸⁹ These matters, no doubt, could become subjects of controversy between the agency and the White House, although the traditional understanding would come into play. To underscore the basic point, the OLC Opinion provides that, as to the latter set of subjects, White House reviewers are in an "advisory and consultative"⁹⁰ role with respect to an agency.

3. *Traditional View Contrary to Congress's Interests*

Another argument for the traditional understanding is that an agency's authorizing statute should not be seen to allow for presidential directives regarding the agency's regulatory activities because such a result would undermine Congress's institutional interests. Elena Kagan also summarily rejects this argument. She notes that Congress is not consistent in defending its own institutional interests in relation to the President.⁹¹ Given Congress's silence on the subject of presidential power, why should we assume that Congress intends to protect its institutional prerogatives?⁹²

Moreover—and here Dean Kagan casts doubt on her own enterprise of discerning legislative intent—there is a "fictive aspect" to any discussion of what Congress seeks when enacting a regulatory delegation.⁹³ Perhaps Congress literally has no intent on the matter of agency head authority in relation to presidential power. It may have "failed to consider" the issue, been "unable to reach consensus" about it, or "chosen to leave the decision to other actors to work out" for themselves.⁹⁴

The problem with the argument that Congress often does not protect its own institutional interests is that this does not establish that Congress never does, or that it is not doing so here. To be sure, members of Congress often seem more concerned with partisan or constituency matters than with

89. *Id.* White House reviewers can engage in discussions with agencies in which they challenge the agency's premises and seek change in the agency's policies so long as they leave ultimate power to decide with the agency.

90. *Id.*

91. *See* Kagan, *supra* note 11, at 2230 (observing that Congress tends to defend its institutional interests poorly).

92. *See id.* (noting that Congress may have failed to consider the question of presidential directive authority).

93. *Id.*

94. *Id.*

protecting the legislature's power in the abstract.⁹⁵ Individual members may have comparatively little reason to pay personal attention to matters relating to Congress's institutional influence, given their preoccupation with amassing personal power to serve and impress their constituents.

Yet personal power depends at least partly on institutional influence. In those situations, it is rational for members of Congress to care about preserving their institution's relative clout. In particular, Congress is organized into committees that deal with particular agencies. Members of Congress obviously are aware of this reality when they delegate regulatory power to agency heads. Why would members of Congress want to undermine the relative power of their own committees vis-à-vis agencies, which would be the predictable effect of assigning directive power over executive branch rulemaking to the President who is, as Kagan recognizes, "Congress's principal competitor for power in Washington"?⁹⁶

With respect to the contention about fictive legislative intent, it is problematic to proceed from a parsing of arguments about legislative intent to a debunking of such arguments in general. It is important to ask whether there is sufficient evidence of legislative intent on which to base a conclusion. After all, we are confronted with bare bones statutory provisions along the lines of, "Agency head *X* has rulemaking authority." It is possible that such a provision is accompanied, on the part of some members of Congress, by a lack of concern about presidential power, an inability to reach a consensus about it, or a desire to leave the issue to others.⁹⁷

Yet these possibilities for individual members of Congress do not require a refusal to assign a collective purpose to the behavior of Congress as a whole. In fact, we commonly attribute a purpose to collective action in light of what a group does, even if individuals in the group cannot be assumed to have that purpose plainly in mind at the time they act. This approach has been defended in the context of upholding the cautious use of legislative history in statutory construction. Justice Stephen Breyer has

95. *See id.* at 2314 ("The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power . . .").

96. *Id.* at 2330. It could be argued that Congress's power is not relatively diminished by a presidential assertion of general rulemaking power. Yet such a flat claim seems implausible. For one thing, if the traditional understanding is jettisoned, Congress cannot raise it as the basis of an objection to presidential influence on agencies. To be sure, Congress always can put countervailing pressure on an agency head faced with pressures from a president. But if the President indisputably has the ultimate power of rulemaking, Congress's pressure presumably will carry less weight than if the President has to tread with some care, as under the traditional understanding.

97. *See* Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 489 (2002) (arguing for a more limited view of delegations of rulemaking power to agencies).

argued by analogy that even if a member of a basketball team has no plainly identifiable, personal intent when he or she makes the moves of a much-practiced play, the fans can intelligibly speak about the team's general purpose in doing what it does.⁹⁸ The same approach is reasonable here.

The central question is what Congress's likely purpose is when its plain language assigns regulatory authority to an agency head. From such language, can we glean any intimations about the agency head's role? On its face, a statutory delegation to an agency head indicates that the agency head is to be the decisionmaker. Any scheme that would displace the agency head's discretion would appear to require specific justification. After all, what is the point of delegating power to an agency head if it can be displaced?

To put the point somewhat differently, an ordinary rulemaking delegation is not silent on the question of the agency head's authority. Although it is silent on the President's role, it does lodge discretion in an agency head—with the natural implication that to displace that official's discretion is to undermine the statute. To require an additional, explicit statement by Congress that the agency head's authority cannot be displaced puts an unwarranted burden on Congress in achieving its apparent aim.

B. Arguments Based on Institutional Competence

In this Section, I will consider arguments against the traditional view based on considerations of institutional competence. From Kagan's perspective, the fate of the traditional view ultimately turns on the President's comparative superiority in promoting accountable and effective decisionmaking. As she frames the issue, if presidential control of agencies advances accountable and effective administration, "then Congress should have to manifest any intent to limit that control," whereas if presidential control undermines those values, "then Congress should have to manifest the opposite desire" to promote presidential directives.⁹⁹ For Kagan, the President's superiority is so patent that we should adopt an interpretive presumption that is the opposite of the traditional view.

The accountability and effectiveness arguments about the presidency, it bears noting, have been used in other contexts to seek enhancements of the President's power. For instance, the contentions have been deployed on behalf of amendments to the U.S. Constitution designed to help the President "form a government"¹⁰⁰ and thereby formulate and carry out

98. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 865 (1992).

99. See Kagan, *supra* note 11, at 2330-31.

100. See Lloyd N. Cutler, *To Form a Government*, 59 FOREIGN AFF. 126, 139-43 (1981)

policies without negotiating with an independent Congress.¹⁰¹ These arguments also underlie the ill-fated attempt to provide the President with a line item veto.¹⁰²

Basic premises of the accountability-centered case for presidential uniqueness are associated with public choice theory. That theory conceives of public institutions in terms of the self-interested choices of actors within them.¹⁰³ A “rational” elected official seeks reelection to maintain his or her power base. Members of Congress endeavor to satisfy their constituents by trading public policies for support for reelection. On this view, it is naive to suppose that members of Congress have large or enduring commitments to the public interest. They possess a drive to remain in power, while their constituents aim to appropriate the benefits of governmental largesse or to avoid the burdens of governmental regulation. A similar dynamic occurs with respect to the President, although—and this point becomes critical—the accountability argument stresses the nationwide character of the President’s constituency.

Constituencies are local in the case of members of the U.S. House of Representatives and state-based in the case of U.S. Senators. What follows from these facts? It is argued that members of Congress look at issues through a lens crafted locally or state-by-state.¹⁰⁴

Contrast this situation with that of the President, who is the only nationally elected political figure (along with the Vice President). As such, the President is in the unique position of having an electoral incentive to represent the nation’s public as a whole. As a consequence, it is asserted, the President alone can stand above the political fray of local pork barrel politics and special interest pleading.¹⁰⁵

(making the argument that the Constitution should be amended to create the “capability of forming a Government”), reprinted in REFORMING AMERICAN GOVERNMENT: THE BICENTENNIAL PAPERS OF THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM II (Donald L. Robinson ed., 1985).

101. See Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679, 716-21 (1993) (critiquing the effectiveness and accountability arguments, which call for a more centralized government structure, on the basis that these arguments are both very vague and “evade substantive differences and choices in our political community”).

102. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding the Line Item Veto Act unconstitutional); see also Thomas O. Sargentich, *The Future of the Item Veto*, 83 IOWA L. REV. 79, 112 n.144 (1997) (citing accountability rationale in legislative history).

103. See, e.g., Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 893 (1987) (“[T]he heart of the economic approach is the assumption that self-interest is the exclusive causal agent in politics.”).

104. See, for instance, former Speaker of the House Tip O’Neill’s famous aphorism, “All politics is local.” SPEAKER TIP O’NEILL WITH GARY HYMEL, ALL POLITICS IS LOCAL: AND OTHER RULES OF THE GAME (1994).

105. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 59 (1995) (“[T]he President is . . . the only official who is accountable to a national voting electorate and no one else.”); see also Frank H. Easterbrook, *Unitary Executive Interpretation: A Comment*, 15 CARDOZO L. REV. 313, 318-19 (1993) (contending

In line with this approach, Elena Kagan emphasizes that because the President must win a national election, he or she must appeal to a national constituency that legislators lack.¹⁰⁶ Kagan acknowledges that specific regulatory issues often are not the subjects of national discussion in a presidential election campaign.¹⁰⁷ She places particular weight on the notion that, as a prospective matter, a President looks to majority sentiments in gauging how to act because the President has incentives to appeal to “a national constituency” and “the preferences of the general public, rather than merely parochial interests.”¹⁰⁸ During a President’s first term, he or she is acutely aware of the need for support for reelection, and during a second term, the President pursues nationally popular policies with the hope of becoming able to choose a successor and carve out a positive legacy for history.¹⁰⁹ The critical point is that, as a comparative matter, the President has a stronger relation to the public’s majoritarian preferences than anyone else, including members of Congress, agency heads, or leaders of interest groups.¹¹⁰

With respect to effectiveness in governing, Kagan sees the President as uniquely able to make rational decisions about competing priorities in regulatory programs. She notes that enhanced presidential control advances “a number of so-called technocratic values: cost-effectiveness, consistency, and rational priority-setting.”¹¹¹ Agencies, in contrast, are seen to have parochial perspectives in line with their limited statutory missions.

Kagan also emphasizes that in certain circumstances, such as those of the Clinton Administration, presidential directives can promote “dynamism or energy in administration,”¹¹² thereby helping to overcome the lethargy that can plague large bureaucracies.¹¹³ While noting checks and balances on

that members of Congress and independent agencies—which are more beholden to committee and subcommittee chairmen—are both “farther from the median of national opinion than are presidents . . .”).

106. See Kagan, *supra* note 11, at 2334 (asserting that presidential elections hinge on “general, rather than local, policy issues”).

107. See *id.* (conceding that bare election results do not inevitably demonstrate wide support for a “candidate’s most important positions, much less the sometimes arcane aspects of regulatory policy”). Kagan also notes that “[a]s the election of 2000 demonstrated, winning a national election does not necessarily entail winning more votes than any other candidate; still less, as the two prior elections showed, does it mean winning a majority of the national electorate.” *Id.*

108. *Id.* at 2335.

109. *Id.* Here, too, she offers qualification, noting that each regulatory issue “probably will play a small role in the public’s overall estimation of presidential performance. . . .” *Id.* at 2335-36.

110. See *id.* at 2336-37 (arguing that, as to political accountability, the President has “the comparative advantage” over other actors affecting the administrative process).

111. *Id.* at 2339.

112. *Id.*

113. See *id.* at 2344 (contending that the courts’ increased demand on agencies to allow

power, she supports a “countertradition” favoring “enhanced government[]” and “executive[] vigor.”¹¹⁴ This countertradition, she argues, is advanced by a vigorous system of presidential control of regulatory decisionmaking.¹¹⁵

Clearly, the accountability and effectiveness arguments promote enhancements of chief executive power. The problem is that they are one-sided and unbalanced. They tend to exaggerate the broad accountability of the President and to understate the representativeness of Congress. They also overstate the policymaking effectiveness of the President while diminishing that of agencies. These exaggerations should give us pause. I will discuss each matter in turn.

1. *The Accountability Argument’s Exaggerations*

Upon examination, the accountability argument in favor of eliminating the traditional view of the President’s role vis-à-vis agencies takes the lessons of public choice theory only so far; in doing so, it offers a one-sided picture. The theory teaches that all public institutions tend to serve organized interests at the expense of the general public.¹¹⁶ There is no reason to suppose that the presidency is immune from the influence of local or special interests.

Indeed, much experience confirms that presidents do respond directly to narrow, sub-national political interests, including those playing major roles in national campaigns and parties. Consider, for instance, the continuing attention that President Clinton paid during his administration to the interests of California’s voters (or Florida’s Cuban-Americans). The fate of California’s electoral votes figured prominently in Clinton’s campaign strategies in 1992 and 1996.¹¹⁷ Consider also President George W. Bush’s continuing concern for retaining the support of the rightwing of the Republican Party, which proved to be critical during the political primary season of 2000 in which Bush achieved preeminence in the field of

interest group participation in rulemaking led to “ossification” of agency decisionmaking and “torpor” as a defining feature of administrative agencies).

114. *Id.* at 2342. Kagan associates this tradition with Alexander Hamilton and with modern theorists who have called for greater energy in government by means of concentrating power in the executive branch. *See id.* at 2343 & n.374 (citing sources denouncing tendency of “divided government” to lead to deadlock).

115. *See id.* at 2344 (arguing that the needs of the modern government call for “a need for institutional reforms that will strengthen the President’s ability to provide energetic leadership in an inhospitable political environment”).

116. When a group acts on incentives to organize despite the costs of doing so, it presumably is seeking to achieve certain discernible gains in the political process. The active pursuit of those gains leads to those well-organized groups having more power than the diffuse public.

117. *See* Sargentich, *supra* note 102, at 127-28 & nn.215-16 (recounting Clinton’s frequent visits to California and his addressing of local interests, such as promises to protect local military bases from closing).

Republican presidential candidates,¹¹⁸ during his first term, and during his 2004 re-election campaign.¹¹⁹ As these examples suggest, it is unrealistic to suppose that presidents solely are accountable to some diffuse, majoritarian interest of the public in general.

Consider also the notion of a presidential “mandate” with reference to agency regulations. Even among issues that are discussed prominently in a presidential campaign, to what extent can one say that an election generates a clear majoritarian mandate on a particular matter of policy?¹²⁰ For one thing, a President can be elected without obtaining a majority of the popular vote—as in the cases of President Clinton in 1992 and 1996 and President George W. Bush in 2000. Moreover, presidential campaigns are heavily influenced by such general matters as the electorate’s perception of national security needs, the state of the economy, or the personal appeal of candidates, as distinct from particular matters of policy.¹²¹ Moreover, largely symbolic issues can dominate discourse during a campaign. Accordingly, it often is strained to suggest that such contests generate sharply-drawn majoritarian mandates as to particular policy issues.

For such reasons, Elena Kagan downplays the importance of a backward-looking mandate as the basis of a claim of special presidential accountability.¹²² Yet what about the notion of a forward-looking

118. See Thomas E. Mann, *For a Bipartisan War President*, CHRISTIAN SCI. MONITOR, Nov. 29, 2001, at 11 (referring to President Bush’s “hypersensitivity to his conservative political base,” especially prior to the terrorist attacks on the U.S. on September 11, 2001, and urging the President to “abandon his practice of always playing first to his political base”).

119. For a critique of the first term of George W. Bush’s presidency for serving right-wing interests, see CHARLES TIEFER, *VEERING RIGHT: HOW THE BUSH ADMINISTRATION SUBVERTS THE LAW FOR CONSERVATIVE CAUSES* (2004).

120. Three weeks after the November 2, 2004 presidential election, an article on the front page of *The New York Times* proclaimed an incongruence between the President’s assertion of the mandate he received and the findings of the latest poll by the New York Times/CBS News. See Adam Nagourney & Janet Elder, *Americans Show Clear Concerns on Bush Agenda*, N.Y. TIMES, Nov. 23, 2004, at A1 (“At a time when the White House has portrayed Mr. Bush’s 3.5 million-vote victory as a mandate, the poll found that Americans are at best ambivalent about Mr. Bush’s plans to reshape Social Security, rewrite the tax code, cut taxes and appoint conservative judges to the bench Nearly two-thirds of all respondents—including 51 percent of Republicans—said it was more important to reduce deficits than to cut taxes, a central element of Mr. Bush’s economic agenda.”).

121. See Seidenfeld, *A Big Picture Approach to Presidential Influence*, *supra* note 57, at 20 (“Thus, presidential elections tend to turn more on the perceived state of the economy in an election year and the individual candidates’ abilities to inspire confidence about the future state of the nation than on perceptions gleaned from particular regulatory stances taken by a candidate or the incumbent administration.”).

122. See Kagan, *supra* note 11, at 2334 (“[E]ven assuming a popular majority for a presidential candidate, bare election results rarely provide conclusive grounds to infer . . . support for . . . [a] candidate’s most important positions, much less the sometimes arcane aspects of regulatory policy.”).

mandate—which Kagan stresses—that a President is qualitatively more likely than any other governmental actor to keep the public’s interest in mind as he or she serves a national constituency?

Most basically, one needs to deal with the idea of a “national” constituency cautiously because presidents rely on certain distinct groups for support. Candidates need the contributions of financially established interests, and they are attentive to their electoral base. Those particular interests are not forgotten after Election Day. It is implausible to view the electorate as an undifferentiated body of nation-wide voters, each of whom carries equal weight with a President.¹²³

Moreover, the very idea of a “national” presidential election is oversimplified. In reality, presidential elections consist of a series of state contests, the rewards of which are the state’s electoral college votes. The nation was reminded of this reality after the November 2000 presidential election, when there was a period of uncertainty about the fate of Florida’s electoral votes and, thus, the outcome of the election itself. In 2004, the presidential election was contested by both major presidential candidates in only a limited number of states, and the result turned on one state’s electoral votes—namely, Ohio’s.

None of this is to suggest that accountability to the public should be downplayed as a value in our constitutional system. As a normative matter, it should be highlighted—although not in a manner that glorifies the President’s position. We also should remember that Congress makes its own unique, affirmative contribution to democratic accountability.

What is this contribution? In its broad-based representation of constituencies across the nation, Congress as an institution is arguably more representative of a wider range of public opinion than any single official, including the President, can hope to be.¹²⁴ To be sure, the voters for members of Congress are local in the case of the House of Representatives and state-based in the case of the Senate. Yet that does not necessarily mean that legislative institutions, acting as such, are unable to look out for the general public interest. No doubt, Congress may have a different take on that interest than the President. This possibility is not a negative factor as long as one respects the role of a democratic legislature

123. See Shane, *supra* note 8, at 197 (“There is no evidence that the President, at any given moment, embodies that set of policy predilections across a wide set of issues that is held by a contemporaneous majority—or, more accurately, by contemporaneous majorities of Americans.”).

124. See *id.* at 200 (“If bureaucratic accountability to elected politicians is to be used as a structural mechanism aimed at achieving direct responsiveness to public opinion, it would probably make more sense to intensify the influence that Congress—especially the House—has over the agencies. Members of Congress are eligible for reelection indefinitely; a common observation of the House is that its members are in a constant election campaign.”).

whose members compete in numerous elections across the country and come together to hammer out positions accommodating a variety of views. In this sense, Congressional discourse serves the values of pluralism as captured by a cacophony of voices speaking for the diversity of life in the United States.¹²⁵

The pluralism represented by Congress stands in contrast to a unified conception of the public good supported by the nation's voting majority. A unified conception does not fit well with the reality of tremendous heterogeneity in our society.¹²⁶ Particularly for those who are or who feel marginalized, the idea of a dominant majoritarianism is likely threatening. In truth, there are many warring notions of the good at play in our contemporary society, and this complexity is at odds with the supposition that an "accountable" government is one that responds to a unified majoritarian will. At a minimum, it seems admirable to foster an ongoing public dialogue that responds to the various communities and perspectives represented by both Houses of Congress as well as the President.

What should be said about the fact that members of Congress work in committees and that committee membership is not representative of the nation as a whole? It is true that committees attract members with special interests in the subject matters of the committees themselves. Why serve on a committee if you are not interested in its jurisdiction? Yet this reality does not defeat the claim that when Congress acts as a whole, with majorities of both the House of Representatives and the Senate in agreement, it represents a broad range of interests, geographical areas, and political orientations. If broad representation is the goal, congressional action is an important means of achieving it.

The accountability argument, then, embraces an oversimplified, one-sided slant in favor of presidential hegemony.¹²⁷ Kagan confronts this concern in a passage in which she discusses the system of checks and balances in the federal constitutional structure.¹²⁸ She sees the critique of

125. The point is to recognize strengths of Congress, not to deny its limits, such as the current problem of gerrymandering by both parties, leading to non-competitive elections in the House of Representatives.

126. For a discussion of the value of diversity in modern debates about the revival of the republican ideal in liberal discourse, see Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1714 (1988) (arguing for normative pluralism in which politics is "the interaction of groups that are more than simple aggregations of individual preferences, but less than components of a single common good").

127. See Robert R. M. Verchick, *Toward Normative Rules for Agency Interpretation: Defining Jurisdiction Under the Clean Water Act*, 55 ALA. L. REV. 845, 858 (2004) (concluding that "Elena Kagan acknowledges the possibility that a President might use his or her power to inappropriately cloud issues and avoid accountability, but she grossly underestimates the danger").

128. See Kagan, *supra* note 11, at 2337 n.347 (citing Farina, *Against Simple Rules for a Complex World*, *supra* note 8, at 989; Shane, *supra* note 8, at 212; and Strauss, *Presidential Rulemaking*, *supra* note 8, at 965 n.*).

her view as comparing the President with “a pluralist system, in which [the President] competes with all others to influence administration.”¹²⁹ Kagan suggests that the framing of the issue as involving “presidentialism versus pluralism” distorts the inquiry more than her framing of the debate as “greater or lesser presidentialism within pluralism.”¹³⁰ She argues that “we inevitably . . . live in a pluralist administrative system,” and so threats to pluralism are not the issue.¹³¹ “The real issue concerns the balance we should strike among all the institutions struggling for administrative power. . . .”¹³²

The difficulty with this suggestion is that the real opposition raised by the presidential mystique is not that of presidentialism versus pluralism. It is thus not fully responsive to say that pluralism is inevitable, although it may be.¹³³

The key choice is between presidentialism and non-presidentialism, or between accepting the presidential mystique and being critical of it. The former approaches seek systematically to enhance presidential power while casting doubt on the legitimacy and efficacy of other institutions of government. The latter approaches do not do so. They presume that the major political branches must be thought of as fully co-equal, that the various institutions of government—including the White House and Congress—have their respective strengths and weaknesses, and that there is no savior among them in the continuing search for accountable governance.¹³⁴

In another context I have defended the principle of dialogue in the creation of public law, which underlies the Constitution’s system of checks and balances.¹³⁵ The dialogue involves the main political institutions of the

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Cf. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 47 (1985) [hereinafter Sunstein, *Interest Groups in American Public Law*] (discussing the federalists’ rejection of either pure republicanism or pure pluralism and instead developing a “hybrid conception of representation,” thus “achiev[ing] a kind of synthesis of republicanism and the emerging principles of pluralism. Politics rightly consisted of deliberation and discussion about the public good.”).

134. Kagan is closer to the mark in framing the question as involving “balance among all the institutions struggling for administrative power.” Kagan, *supra* note 11, at 2337 n.347. However, one could quibble about whether all the institutions actually are struggling for administrative power. The balance to be sought is not in the use of administrative power as such, but in the use of governmental power of whatever sort. Congress uses its legislative and allied oversight and investigative powers; the President uses executive power, including oversight of administration; agencies use their executive power pursuant to statute. Thus, the key balance at stake is not between the President and pluralism or among institutions struggling for administrative power, but among the various institutions of government, with each using its distinctive powers.

135. See Sargentich, *supra* note 101, at 720 (stressing the importance of preserving a “sense of competing social visions in order to take account of alternative experiences and

federal government—Senate, House of Representatives, and President—as contributors to broad public debate about national policy.¹³⁶ It is true that each institution has its distinctive constituency that will influence its voice. The key point is to put the voices together to develop diverse perspectives on public affairs. Such a dialogue can help create a healthy depth and breadth in policy discourse.

An active view of checks and balances fosters expansive access to power, for members of the public can have relationships with alternative institutions and still have their own voices heard.¹³⁷ Having various points of access to power is an intelligent response to the social diversity of the United States.¹³⁸ It is especially reassuring to citizens who oppose the policies of a given President, for whom the value of checks on the executive are obvious. Furthermore, vigorous debate fostered by a robust system of institutional interaction can help to prevent the dominance of particular special interests.¹³⁹ Without romanticizing the present, deliberation among actors with differing perspectives can broaden the voices heard and diffuse power.

One should not exaggerate in the opposite direction. The point is that the policy-based argument for eliminating the traditional view of the President's role vis-à-vis agencies tends to overstate the President's accountability to the public in general and, at the same time, to understate the accountability of Congress. By privileging the President's voice, the presidential mystique does not sufficiently acknowledge the principle of dialogue involving the people and all of the institutions of government in pursuit of the public interest.

2. *The Effectiveness Argument's Exaggerations*

The effectiveness-based argument for the presidential mystique builds on the notion that agencies have single-mission charters that generate narrow-gauged thinking about public policy.¹⁴⁰ The presumed narrowness of

viewpoints”).

136. *Id.* at 733.

137. *See id.* at 735 (“[I]ndividuals and groups may have a greater chance of winning the ear of some powerful official in their efforts to achieve representation.”).

138. *See* Erwin Chemerinsky, *The Question's Not Clear, But Party Government Is Not the Answer*, 30 WM. & MARY L. REV. 411, 415 (1989) (“No group wins or loses all the time. As a result, no group need feel completely disenfranchised and better off working to overthrow the system of government. This stability is probably the most notable and desirable feature of the American system . . .”).

139. *See* Sunstein, *Interest Groups in American Public Law*, *supra* note 133, at 44 (“The system of checks and balances within the federal structure was intended to operate as a check against self-interested representation and factional tyranny in the event that national officials failed to fulfill their responsibilities.”).

140. *See* Kagan, *supra* note 11, at 2339 (“Alone among the actors competing for control over the federal bureaucracy, the President has the ability to effect comprehensive, coherent change in administrative policymaking.”).

agencies' perspectives is contrasted with the more comprehensive, government-wide orientation of the White House. Kagan's presidentialism sees presidential directives to regulatory agencies as tools for improving the comprehensive rationality of administration.¹⁴¹

For one who accepts that government can play an important role in helping to find solutions to social problems, it is difficult to doubt aspirations for greater energy in government. Ideally, a President can provide a useful measure of the coordination and energy that might be in limited supply in a far-flung executive establishment. But to exalt the presidential stance as singularly rational, comprehensive, and valuable is to disregard the possibility of presidential narrow-mindedness, fixation on particular goals to the detriment of broader objectives, or indebtedness to specific interests rather than a more idealized national perspective.¹⁴² It is not unheard of for presidents themselves to be parochial in their commitments.

The familiar tension between arguably pursuing abstract rationality and actually making debatable decisions can be illustrated in terms of the operation of cost-benefit analysis itself. In broad terms, such analysis seems to be a model of rational thinking, enjoining action that promotes net benefits to society. Yet in addition to the concerns that these arduous analysis requirements add to the ossification of the rulemaking process,¹⁴³ consider the concrete manipulability of the analysis. In doing such analyses, often controversial judgments about valuing the effects of regulatory actions need to be made. A common example involves choosing the rate at which future benefits are to be discounted to arrive at a present-day valuation of benefits. Selecting the discount rate is a value-laden process. Moreover, it may be outcome-determinative in cases in which many of the gains from regulation are expected to arrive in the future. It is unrealistic to suggest that decisions about discount rates are unproblematically "rational," "consistent," and otherwise based on objective, government-wide criteria, as opposed to being significantly based on normative and frankly debatable judgments in particular instances.¹⁴⁴

141. See *id.* (discussing the President's "capacity to achieve set objectives, without undue cost, in an expeditious and coherent manner").

142. See Sunstein, *Interest Groups in American Public Law*, *supra* note 133, at 43 ("[T]he separation of powers scheme was designed with the recognition that even national representatives may be prone to the influence of 'interests' that are inconsistent with the public welfare.").

143. See *infra* note 146 and accompanying text (discussing the contribution of presidential oversight to agency ossification).

144. See generally Lisa Heinzerling, *Discounting Our Future*, 34 LAND & WATER L. REV. 39 (1999) (asserting that the federal government errs when it values future events less than present events for the purposes of regulation).

There remains the contention that the President can help to infuse into a torpor-laden bureaucracy the energy and dynamism sought from a forward-looking executive branch. That may be so. However, one person's energy can be another person's mistake. Even assuming the President assiduously adheres to legal constraints, a President can energetically impose on the bureaucracy a wrong-headed policy. The Reagan Administration provides numerous examples of energetic efforts to halt the development of rules protective of workers and the environment and to limit the scope of governmental attempts to reduce societal inequities.¹⁴⁵ Some might cite the decision of George W. Bush to review regulatory initiatives undertaken late in the Clinton Administration as a case of presidential rejection of valuable governmental initiatives.¹⁴⁶ Others will present different examples.¹⁴⁷

Also, what Kagan calls the "necessary condition for presidential administration" designed to direct the regulatory process is "that it occur[s] in public."¹⁴⁸ Unfortunately, we know that much is held secret in the administration of George W. Bush.¹⁴⁹ There is simply no reason to suppose that other presidents will necessarily believe in transparency to the extent that, Kagan tells us, Clinton did.

Furthermore, the process of White House supervision mandated by executive order and statute imposes significant costs on the regulatory system. For that reason, some have seen White House review not as an energizer of agency rulemaking, but rather as another cause of the ossification of the regulatory process.¹⁵⁰

Moreover, the idea that energy is missing from administration slants the analysis strongly against the values of agency responsibility. To be sure, many agencies face large backlogs with limited resources. Yet, over-

145. Kagan acknowledges that the "desirability of such [presidential] leadership depends on its content; energy is beneficial when placed in the service of meritorious policies. . . ." Kagan, *supra* note 11, at 2341.

146. See Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001) (instructing review of all regulations issued at the end of President Clinton's term of office that had not yet taken effect).

147. See TIEFER, *supra* note 119, at 121-23 (describing the Bush Administration's systematic dismantling of various environmental regulations).

148. Kagan, *supra* note 11, at 2362.

149. For a critical discussion of George W. Bush's presidency, including a tendency toward secrecy in government, see SENATOR ROBERT C. BYRD, *LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY* (2004); KEVIN PHILLIPS, *AMERICAN DYNASTY: ARISTOCRACY, FORTUNE, AND THE POLITICS OF DECEIT IN THE HOUSE OF BUSH* (2004); TIEFER, *supra* note 119.

150. See, e.g., Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1436 (1992) ("The net result of all of the aforementioned procedural, analytical, and substantive requirements is a rulemaking process that creeps along, even when under the pressure of statutory deadlines."); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 62-63 (1995) (criticizing the OMB review process for increasing costs, delays, and inter-branch friction).

emphasis on these realities can prompt one to miss the stories about what agencies responsibly do, given the experience that they have gained.¹⁵¹

It also seems critical not to lose sight of the historical reality that agencies are created, at least in significant part, to address social issues that Congress believes are better addressed by administrators rather than by Congress or Presidents alone. 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.¹⁵² In the end, the values affirmed by agency decisionmaking should be kept more clearly in mind than they are by the presidential mystique.

CONCLUSION: PRESIDENTIAL ADMINISTRATION RE-EVALUATED

Dean Kagan has embraced presidential administration as a means of legitimizing broad delegations to agencies. In rejecting the stance of unitary presidentialists, she accepts the reality of independent agencies. She also bases her vision on an appreciation of energetic presidential leadership in the service of public purposes. In developing a new presidentialism, Kagan has brought the model to a high level of sophistication as a framework for justifying administrative power.

In discussing her approach, Kagan supports a presumption against the traditional view of presidential power vis-à-vis agencies. From her perspective, the understanding should be that the President can displace regulatory authority vested by statutes in agency heads. Kagan makes arguments based on legislative intent as well as institutional competence, with the latter constituting a policy-based defense of presidential directives to agencies as uniquely accountable and effective.

As argued in this Article, the traditional view has the advantage of reflecting a more straight-forward reading of statutory language delegating regulatory authority to agency heads. The fact that the traditional view barring presidential displacement of agency head discretion is not a necessary or logically compelled reading does not mean that it is not a serious or persuasive one. Also, the policy arguments for the presidential mystique exaggerate the presidency's positive qualities, while unduly diminishing the attributes of Congress and agencies. Indeed, the accountability and effectiveness claims present a picture of the President as

151. See Shane, *supra* note 8, at 205 ("Each agency, because of its discrete jurisdiction and sustained immersion in particular categories of problems, is expected to develop a base of knowledge and methodological sophistication intended to protect against decision making based solely on passion or 'interest.'").

152. See Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1576 (1992) ("Administrative agencies . . . fall between the extremes of the politically over-responsive legislature and the under-responsive courts.").

a white knight uniquely able to vindicate the public interest. Although it can be illuminating to speak in broad terms about presidential, legislative, and administrative decisionmaking, it seems important to portray each institution's attributes in even-handed ways. This is more in keeping with a critical understanding of the President's position and an active conception of checks and balances that broadens public involvement, diminishes the dominance of single viewpoints, and fosters diversity in democratic deliberation.

We should preserve an appreciation of richly divergent perspectives in a world of checks and balances, in which no single hierarchical voice should be seen to overcome all others. Of course, nothing can guarantee a rich polyphony¹⁵³—but at least we can keep from being totally drowned out by the unifying voices of our age.

153. See Farina, *Against Simple Rules for a Complex World*, *supra* note 8, at 1037 (calling for structural polyphony in the performance of United States constitutionalism); Strauss, *Presidential Rulemaking*, *supra* note 8, at 965 n.* (reaffirming the need for structural polyphony).