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Judicial Review and the President's Statutory Powers

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IT is tempting to regard the law that governs the Presidency as flowing mostly from the handful of great constitutional cases that have infused article II with meaning.[1] Of course, no one would deny that these cases mark the outer limits of legitimate presidential action, and no one should underestimate their real capacity to constrain executive decisionmaking. Nevertheless, most day-to-day questions of presidential power depend in large part on questions of statutory authority. In litigation challenging presidential actions, the Government often places exclusive reliance on statutory powers.[2] Moreover, when constitutional issues are intermixed with statutory ones, courts ordinarily examine the statutory issues first, in hopes of avoiding a decision based on the Constitution.[3] Although litigation involving the President's implementation of his

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[1] E.g., Buckley v. Valeo, 424 U.S. 1 (1976); United States v. Nixon, 418 U.S. 683 (1974); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Humphrey's Executor v. United States, 295 U.S. 602 (1935); Myers v. United States, 272 U.S. 52 (1926); The Prize Cases, 67 U.S. (2 Black) 635 (1863). The constitutional cases, interpreting particular provisions of article II, are independent of one another in many respects. See Dames & Moore v. Regan, 101 S. Ct. 2972, 2977-78 (1981). They do, however, reflect some unifying principles; see notes 32-50 infra and accompanying text.

[2] E.g., AFL-CIO v. Kahn, 618 F.2d 784, 787 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979).

[3] E.g., Dames & Moore v. Regan, 101 S. Ct. 2972 (1981); Kent v. Dulles, 357 U.S. 116 (1958).

statutory powers[4] has occurred with increasing frequency in recent years, there exists no generally accepted method for judicial review of these presidential actions. By its terms, the Administrative Procedure Act (APA),[5] which governs judicial review of decisions by most administrative officials, is not clearly applicable to the President.[6]

This article defines a standard of judicial review for the President's statutory decisions. The focus is on the kind of presidential action that most often receives substantive review: the administration of statutory programs that have a domestic emphasis, through decisions with a sufficiently direct effect on the public to engender a ripe judicial controversy.[7] The lawsuits are typically "nonstatutory" actions brought in federal district court for injunctive or declaratory relief.[8] The article uses four examples, all litigated during the Carter Administration, to illustrate the problems courts encounter, and to provide grist for analysis. In all of these cases, the courts groped to define their appropriate role in reviewing presidential decisions. The cases involved President Carter's imposition of wage-price guidelines on government contractors,[9] his attempt to impose a ten-percent gasoline conservation fee on the public,[10] his reservation of vast tracts of federal land in Alaska by designat-

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[4] The President has general authority to delegate his statutory powers to subordinate officials, 3 U.S.C. § 301 (1976), and he often does so. This article discusses only those statutory powers that have been granted directly to the President and have been retained by him.

[5] 5 U.S.C. §§ 551-706 (1976).

[6] See notes 93-99 infra and accompanying text.

[7] Many of a President's statutory actions—for example, many of his executive orders—are procedural directives to the bureaucracy and are shielded from immediate judicial review by such doctrines as standing and ripeness. See, e.g., Independent Meat Packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975), cert. denied, 424 U.S. 966 (1976). It is when such orders are implemented in a fashion that affects the public that judicial review occurs, if at all; moreover, review then focuses on the implementary decisions themselves.

[8] These actions are misleadingly called "nonstatutory" only because they are not based on a judicial review authorization found in the relevant program statute, but on general authorizations for review of administrative action—which are always statutory at the federal level. E.g., 28 U.S.C. § 1361 (1976) (mandamus); 28 U.S.C. §§ 2201-2202 (1976) (declaratory judgment). See generally W. Gellhorn, C. Byse & P. Strauss, Administrative Law 919-37 (7th ed. 1979).

[9] AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979). See notes 165-79 & 228-32 infra and accompanying text.

[10] Independent Gasoline Marketers Council v. Duncan, 492 F. Supp. 614 (D.D.C. 1980). See notes 233-44 infra and accompanying text.

ing them National Monuments,[11] and his selection of the builder and route for a proposed pipeline to transport crude oil from the west coast to the interior.[12]

The article begins by drawing overall guidance from basic separation of powers doctrine. It then explores the process of presidential decisionmaking and compares it to that of the agencies. The application of the APA to govern presidential action is considered and rejected in light of the special character of the office. The article then elaborates principles for judicial review by considering how each of the primary controls on the legality of administrative action—the delegation doctrine, statutory interpretation, procedural constraints, and substantive review—should apply. The effort throughout is to ground suggested approaches in existing law, with adaptations reflecting the unique character of the Presidency.

I. Analytic Framework: Separation of Powers Doctrine

The articulation of principles to govern the role of courts in reviewing the President's statutory decisions requires a frame of reference in the basic constitutional doctrines that broadly define the interrelationships of the three branches of government. The inquiry must consider the President's constitutional powers to the extent that they affect a court's treatment of issues concerning his statutory powers.

A. The Constitution's Text and the Framers' Purposes

Article II of the Constitution is notoriously ambiguous. The text most relevant here provides that "[t]he executive Power shall be vested in a President" who "shall take Care that the Laws be faithfully executed."[13] Controversy surrounds whether these clauses simply authorize the President to implement policies declared by Congress, or whether they grant the President any substantive power of his own.[14] The views of two Presidents delineate

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[11] Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980). See notes 154-64 infra and accompanying text.

[12] No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981). See notes 180-92 & 213-16 infra and accompanying text.

[13] U.S. Const. art. II, §§ 1, 3.

[14] At the least, the "vesting" clause was meant to reject proposals advanced at the Convention for a plural executive. See E. Corwin, The President, Office and Powers 1787-1957,

the parameters of the debate. The cautious Taft thought that "the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary."[15] The aggressive Theodore Roosevelt urged his

> insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. . . . [I]t was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws.[16]

Of course, it is possible to overstate the difference between these two theories of the nature of executive power—generosity in implying powers would narrow the gap. Even with a liberal approach to implication, however, there remains an important distinction between placing the burden of justification on the President or on those who would challenge his actions.

For the most part, the President's constitutional powers derive from article II's relatively specific grants of power to him—for example, to act as Commander in Chief and to conduct the nation's foreign relations.[17] Yet even in these areas, the President usually shares authority with Congress, which has the explicit power to declare war and regulate foreign commerce.[18] In consequence, the problem of drawing lines between the executive and legislative spheres is difficult in every context. Given the vagueness of the

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at 10-12 (4th rev. ed. 1957). Corwin goes on to note, however, that arguments for a hroader view soon appeared. He recounts that Hamilton, no enemy of executive power, contended "that the opening clause of Article II is a grant of power; secondly, that the succeeding more specific grants of the article, except when 'coupled with express restrictions or limitations,' 'specify the principal articles' implied in the general grant and hence serve to interpret it." Id. at 179.

[15] W. Taft, Our Chief Magistrate and His Powers 139-40 (1916). As Justice Jackson subsequently pointed out, however, theory is one thing and practice another—as President, Taft took at least one well-known action that lacked any firm legal foundation. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.1 (1952) (Jackson, J., concurring) (citing United States v. Midwest Oil Co., 236 U.S. 459 (1915), which upheld a proclamation withdrawing public lands from private entry and development).

[16] T. Roosevelt, Autobiography 388-89 (1919).

[17] See generally Fleishman & Aufses, Law and Orders: The Problem of Presidential Legislation, 40 Law & Contemp. Probs. 1, 9-13 (1976).

[18] U.S. Const. art. I, § 8, cls. 3, 11. See generally L. Henkin, Foreign Affairs and the Constitution 37-123 (1972).

Constitution itself, it is necessary to seek further guidance from the underlying purposes of the Framers.

Simply put, the Framers intended "that the powers of the three great branches of the National Government be largely separate from one another."[19] To state this basic—yet qualified—principle, however, is not to answer concrete questions about the Constitution's allocations of power. To the Framers, the technique of creating separate institutions of government was instrumental to effecting two underlying goals that should guide constitutional interpretation. In large part, they sought to prevent dangerous concentrations of power in any one branch.[20] The Constitution does not pursue this purpose by wholly isolating the three branches of government from one another, however. Instead, it makes primary allocations of responsibility to each branch, subject to checks and balances in the form of specified mechanisms for each branch to participate in and check the exercise of power by the others.[21] Nevertheless, the limits of power are not self-defining.[22]

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[19] Buckley v. Valeo, 424 U.S. 1, 120 (1976). See also, e.g., J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

[20] See The Federalist Nos. 47 & 48 (J. Madison). See also Chadha v. INS, 634 F.2d 408, 422 (9th Cir. 1980), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (Nos. 80-1832, -2170 & -2171): "Thomas Jefferson wrote that the basis of all free government was that 'the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.'" (quoting T. Jefferson, Notes on the State of Virginia 120 (W. Peden ed. 1955)).

[21] The President is a participant in the lawmaking process by virtue of his authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.

Buckley v. Valeo, 424 U.S. 1, 121 (1976).

[22] This is evident from Madison's carefully balanced explanation in The Federalist Papers:

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers. It will not be denied, that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.

The Federalist No. 48, at 343 (B. Wright ed. 1961) (J. Madison).

Functional analysis of the Framers' overall scheme provides further guidance. The Constitution assigns three branches having quite dissimilar institutional characteristics tasks particularly suited to each of them—for example, judges with life tenure possess the power of adjudication.[23] This method of allocating responsibilities reveals a second, less often identified, purpose of the separation of powers: to promote government efficiency.[24] The Framers' separation of the legislative and executive branches reflected their unhappy experience under the Articles of Confederation, which had provided for no national executive. Congress had performed executive as well as legislative functions, at serious cost to effective government.[25] Accordingly, the Framers created separate institutions for legislation and execution. They could not produce a bright line of demarcation between these functions, however, because all statutory delegations of power to the executive confer at least some discretion to define the law with greater particularity—and thus to "make law"—through its execution.[26] Therefore, determining the extent of presidential authority depends on the clarity with which Congress sets the line between legislative command and executive discretion, and on the nature of judicial review, which can serve to clarify—or to obscure—the re-

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[23] Judicial doctrines later arose to preserve the original allocation of responsibilities: for example, that article III judges may not be assigned executive functions, Hayburn's Case, 2 U.S. (2 Dall.) 408 (1792); that Congress may not delegate excessive lawmaking power to the executive, see generally, e.g., FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

[24] Chadha v. INS, 634 F.2d 408, 423 (9th Cir. 1980), cert. granted, 50 U.S.L.W. 3244 (U.S. Oct. 5, 1981) (Nos. 80-1832, -2170 & -2171). See generally Fisher, The Efficiency Side of Separated Powers, 5 J. Am. Stud. 113 (1971).

[25] As Jefferson put it:

> I think it very material to separate in the hands of Congress the Executive & Legislative powers, as the Judiciary already are in some degree. This I hope will be done. The want of it has been the source of more evil than we have experienced from any other cause. Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution. The smallest trifle of that kind occupies as long as the most important act of legislation, & takes place of everything else.

4 T. Jefferson, The Writings of Thomas Jefferson 424-25 (P. Ford ed. 1892) (letter to Edward Carrington, Aug. 4, 1787). Washington echoed the point: "It is unnecessary to be insisted upon, because it is well known, tbat the impotence of Congress under the former confederation, and the inexpediency of trusting more ample prerogatives to a single Body, gave birth to the different branches which constitute the present general government." 30 G. Washington, The Writings of George Washington from the Original Manuscript Sources, 1745-1799, at 300-01 (J. Fitzpatrick ed. 1944), quoted in Fisher, supra note 24, at 117.

[26] See Bruff, Presidential Power and Administrative Rulemaking, 88 Yale L.J. 451, 472-73 (1979).

spective responsibilities of the other branches.

Delineation of the judicial role in this scheme must begin with recognition that the courts should not intrude on the policymaking functions assigned to the political branches; instead, the courts must limit themselves to the important function of assuring that the constitutional process for policymaking has been observed.[27] The Framers expected Congress to be the center of policy formation—indeed, they feared the legislature's potential power, and provided such structural checks as bicameralism and the President's veto.[28] Thus, to some extent the Constitution's controls on the policymaking process are self-executing. Nevertheless, when Congress enacts a statute that the executive must implement, questions necessarily remain concerning the extent to which the statute resolves policy issues, and the extent to which it leaves them to executive discretion. Courts must address those questions pursuant to the ordinary judicial task of interpreting statutes, which the Framers regarded as both a primary responsibility of the courts and an important check on the other branches.[29] At the time, common law courts had established the practice of reviewing executive actions for conformity to law by means of the extraordinary writs, although the concept of judicial review of executive action was inchoate.[30]

To say that courts should address issues of statutory distribution of policymaking authority is not to say that they can provide precise answers in particular cases. Statutory divisions of responsibility between Congress and the executive are not inherently precise, and courts cannot make them so. Nevertheless, the courts can police the executive implementation of statutes in a way that will assure the integrity and visibility of the Constitution's policymaking process as a whole. To assure integrity, courts should require executive actions to be reasoned resolutions of fact and policy issues

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[27] Compare J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980) (emphasizing the role of the courts in policing the political process by review of legislation under due process and equal protection doctrines).

[28] See The Federalist Nos. 47-49, 51 (J. Madison); 71 & 73 (A. Hamilton).

[29] Hamilton, in the process of arguing the controversial proposition that the courts could interpret the Constitution to invalidate legislation, remarked: "The interpretation of the laws is the proper and peculiar province of the courts." The Federalist No. 78, at 492 (B. Wright ed. 1961) (A. Hamilton). See also The Federalist No. 81 (A. Hamilton).

[30] See generally W. Gellhorn, C. Byse & P. Strauss, supra note 8, at 923-37.

that are consistent with identifiable statutory policies. This effort would respond to the Framers' central purpose of avoiding excessive power, by preventing the President from evading statutory policies meant to confine him. To assure visibility, courts should require the President to reveal a legal basis for a decision, so that Congress and the public can make an informed judgment on its political acceptability. Thus, even though substantive review of a presidential decision is limited, courts can pursue the Framers' secondary purpose of fostering efficiency by clarifying the responsibility for decisions as between the political branches. The process by which courts should exercise this role is elaborated below. Although separation of powers precepts can provide only general guidance,[31] their importance is central.

B. Supreme Court Delineation of Judicial Review of Executive Action

In some of its most famous cases, the United States Supreme Court has sketched the general relationships among the branches of government. Although *Marbury v. Madison*[32] is best known for its assertion of judicial power to adjudicate the constitutionality of statutes, the case contains some equally fundamental doctrine regarding the relationship of the executive to Congress and the judiciary. Marbury had brought a mandamus action against Secretary of State Madison to force delivery of his commission as justice of the peace for the District of Columbia, a position created by a statute granting the justices a five-year term of office. In deciding that the statute granted Marbury a legal right, Chief Justice Marshall interpreted the statute to restrict the President's power to remove a justice at will, and assumed that Congress could constitutionally impose that limit. The question of whether this right carried a legal remedy prompted Marshall to inquire whether the Constitution committed enforcement of the right solely to the executive as a political question. Here Marshall distinguished discretion given the

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[31] For recognition of the difficulty of applying separation of powers principles to particular controversies, see, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); Springer v. Phillipine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting).

[32] 5 U.S. (1 Cranch) 137 (1803). See generally Van Alstyne, A Critical Guide to Marbury v. Madison, 1969 Duke L.J. 1.

executive by the Constitution or a statute, which the courts could not control, from duties mandated by statute, which gave rise to legal rights.[33] Marshall completed his analysis by asserting flatly that it was for the courts to determine whether a legal right existed in a particular case; therefore they could grant a remedy.[34] The appropriate remedy, Marshall thought, would be mandamus, which could be issued against even a high official as long as it would enforce a legal right, rather than interfere in the exercise of discretion.

Thus, *Marbury* laid the foundation of American administrative law by affirming both the power of Congress to limit the President's discretion and the power of the courts to interpret and enforce those limits.[35] The Court decided the latter issue without an analytic demonstration of the need for judicial intervention. The alternative of deferring to the executive would have required reliance in part on the executive's own constitutional duty to execute the laws faithfully, and in part on the opportunity for Congress to enter the fray. In *Marbury,* the Court appeared to find sufficient justification for its intervention in the need for judicial protection of individual rights against executive infringement.

There are additional reasons why it would be unwise to treat the

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[33] By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . In such cases, . . . whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. . . . But when the legislature proceeds to impose on [the Secretary of State, some of whose actions implement the President's political powers] other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion, sport away the vested rights of others.

5 U.S. at 165-66.

[34] See also United States v. Nixon, 418 U.S. 683 (1974), in which the Court, quoting *Marbury*'s statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is," rejected the President's argument that the separation of powers doctrine precluded judicial review and determination of the claim of executive privilege he had made. Id. at 703 (quoting *Marbury,* 5 U.S. at 177).

[35] Succeeding cases have built a firm edifice on this foundation. In Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838), the Court confirmed the *Marbury* dicta by holding that a writ of mandamus could issue to compel the Postmaster General to comply with a statute that required him to pay a claimant a settlement reached by an outside arbitrator. As in *Marbury,* the Court stressed that a ministerial, rather than a discretionary, duty was involved. Id. at 613.

President's statutory duties as political questions.[36] A government having two policymaking branches that are in constant competition needs an arbiter to identify the locus of responsibility in particular cases. The alternative would be to force Congress to work its will with the executive through means that would frequently be excessive[37] or unrelated to the controversy at hand.[38] This would introduce unnecessary inefficiencies into the operation of government. More seriously, it would accord Congress both too much and too little power to enforce its existing statutes. Congress would have insufficient power insofar as the President's role as head of his party would enable him to forestall effective legislative response. Congress would have excessive power in two ways. First, Congress could effectively alter existing statutes without following the constitutional process for amending them, simply by acceding to presidential decisions inconsistent with them. Second, the President would lose an important means of defending the legitimacy of his actions. A judicial determination that executive action is consistent with statutory authority enables a President to blunt charges that he has overstepped his role in defiance of the institutional interests of Congress.

The principal modern authority on the relationship between the President and Congress, which also indirectly establishes critical aspects of the relationship between these branches and the courts, is the steel seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*.[39] President Truman, concerned that a steel strike would cripple the Korean War effort, issued an executive order directing the

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[36] For a provocative thesis that courts should regard constitutional (but not statutory) issues concerning the respective powers of Congress and the President as nonjusticiable political questions, see J. Choper, Judicial Review and the National Political Process 260-379 (1980). For reviews of this work, see McGowan, Constitutional Adjudication: Deciding When to Decide, 79 Mich. L. Rev. 616 (1981); Monaghan, Book Review, 94 Harv. L. Rev. 296 (1980).

[37] The ultimate congressional recourse of impeachment would be disproportionate for most statutory controversies. Congress might choose the alternatives of removing all statutory authority for the program or shifting it to a subordinate officer who is subject to judicial control; either sanction could defeat Congress's overall purposes, however.

[38] An example of an unrelated sanction would be denial of appropriations for one of the President's favorite programs.

[39] 343 U.S. 579 (1952). See generally M. Marcus, Truman and the Steel Seizure Case: The Limits of Presidential Power (1977); Corwin, The Steel Seizure Case: A Judicial Brick Without Straw, 53 Colum. L. Rev. 53 (1953); Kauper, The Steel Seizure Case: Congress, the President, and the Supreme Court, 51 Mich. L. Rev. 141 (1952).

Secretary of Commerce to seize and operate the steel mills. The Supreme Court affirmed an injunction against the seizure. The Court emphasized that the President relied on neither express nor implied statutory authority in issuing the order. Justice Black's opinion for the Court stressed that Congress had recently considered and rejected proposed seizure authority in its debates on the Taft-Hartley Act.[40] The Court rejected the argument that the President nevertheless had "inherent power" to avert the threat to national security posed by a steel strike in wartime, and concluded that neither the President's power as Commander in Chief nor the general constitutional grant of executive power was sufficient to justify the seizure.[41] *Youngstown* thus stands for the proposition that statutes setting domestic policy limit the President's discretion. Justice Black's supporting analysis, however, was too rigid to provide sound future guidance. He characterized lawmaking activity as an exclusive province of Congress,[42] despite the absence of any neat functional distinction between legislation and execution.[43]

It is Justice Jackson's famous concurring opinion in *Youngstown*

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[40] 343 U.S. at 586. President Truman had sent two messages to Congress seeking ratification of his action; none occurred. Id. at 583.

[41] Id. at 587-88. Previous Supreme Court cases had recognized "inherent" executive power to act without statutory authority in at least some contexts. In re Debs, 158 U.S. 564 (1895) (executive power to obtain injunction against rail strike); In re Neagle, 135 U.S. 1 (1890) (executive power to assign a marshal to protect a Supreme Court Justice). See also Myers v. United States, 272 U.S. 52, 118 (1926): "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed."

[42] Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ." . . .

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.

343 U.S. at 587-88.

[43] By the time *Youngstown* was decided, the Court had recognized repeatedly the power of Congress to delegate broad lawmaking power to the executive. E.g., Yakus v. United States, 321 U.S. 414, 425-27 (1944).

that has most influenced subsequent analysis.[44] He began by acknowledging that different amounts of presidential power could be found in different circumstances. Rather than posit simplistic categories of wholly distinct government functions, Justice Jackson emphasized the interrelationship between congressional and executive power.[45] He noted that presidential power is greatest when taken pursuant to an express or implied authorization of Congress, and least when incompatible with the express or implied will of Congress. Between these two categories he identified a "zone of twilight" in which a President must rely principally on his "own independent powers." Justice Jackson concluded that Congress had denied the President the power he claimed in *Youngstown,* so that the injunction was proper.

Youngstown does not preclude claims of "inherent" executive power where Congress has not forbidden presidential actions, although the broad sweep of the majority's opinion is most inhospi-

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[44] E.g., Dames & Moore v. Regan, 101 S. Ct. 2972, 2978 (1981) (referring to the opinion as bringing together "as much combination of analysis and common sense as there is in this area").

[45] Presidential powers are not fixed but fluctuate depending upon their disjunction or conjunction with those of Congress. We may well begin by a somewhat oversimplified grouping of practical situations in which a President may doubt, or others may challenge, his powers, and by distinguishing roughly the legal consequences of this factor of relativity.

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

343 U.S. at 635-38 (Jackson, J., concurring) (citations omitted).

table to such claims.[46] Other modern constitutional cases have continued to display a cautious approach to claims of presidential power that lack a clear textual foundation,[47] although the Court has recognized limited powers of that kind in some circumstances.[48] This point is important to the interplay of constitutional and statutory issues in the process of statutory interpretation.

Youngstown's confirmation of *Marbury*'s assertions that statutes bind the President and that the courts must enforce those limits is clearly sound as a general principle. Nevertheless, resolving the presidential claim of power advanced in *Youngstown* taxed judicial capacities to their limits. In passing the legislation that the Court interpreted to forbid seizure, Congress did not consider the precise context that the President later faced. To some extent, of course, this is true of all application of legislative policy to particular facts. Yet in *Youngstown* the courts had to appraise the gravity of the President's claim of emergency in order to decide whether it warranted refusing to extend a general ban on seizures to that case. Moreover, the President had assured Congress that he would honor its instructions in the matter.[49] Perhaps, then, because of the President's claim of constitutional power, the Court should not have conducted a normal search for implied statutory policies that could forbid his action. Leaving this controversy to the political process would have deferred to the executive's special capacity to respond to emergencies, and would have recognized Congress's inherent lack of capacity to foretell them.[50] To recognize that the presence of a serious presidential claim of constitutional power should make the courts reluctant to conclude that a statute forbids his action, however, should not alter the nature of judicial review in cases not presenting a constitutional issue.

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[46] See Bruff, supra note 26, at 475 n.113.

[47] E.g., Dames & Moore v. Regan, 101 S. Ct. 2972 (1981); United States v. Nixon, 418 U.S. 683 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971).

[48] E.g., Dames & Moore v. Regan, 101 S. Ct. 2972 (1981); United States v. Nixon, 418 U.S. 683 (1974).

[49] See note 40 supra.

[50] See P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1397-98 (2d ed. 1973).

II. The President's Statutory Decisions: Process and Function

The President's statutory decisions are very diverse. Formally, they are adopted in various ways: through executive orders, proclamations, and other means such as notices in the Federal Register or memoranda to subordinates.[51] The particular form selected is not of intrinsic importance to the analysis here, because it may result from considerations no weightier than bureaucratic tradition. The important concerns for purposes of judicial review are the process that precedes a decision, the extent to which the formal document embodying the decision explains its basis, and the substantive nature of the decision.

A. The Process of Presidential Decisionmaking

Although the process that precedes a President's implementation of his statutory powers varies somewhat from administration to administration—indeed, from day to day—it follows an overall pattern.[52] Few impending decisions reach the White House without previous, often extensive, analysis in one or more of the executive agencies. Thus, when the time comes for the President to exercise his discretion, an administrative record exists in the bureaucracy—a mass of raw data, analysis, and opinion from both within and without the government.[53] This "record" is ordinarily far too massive and unwieldy for any actual transmittal to the White House; in any event, no one there would have either the time or the inclination to pore through it. Therefore, although statutes do not always require agencies to forward formal recommendations to the President prior to his decision, agencies normally do so, if only to summarize and evaluate the administrative record they have compiled. Moreover, any interested agency normally has a policy orientation that causes it to favor, either openly or subtly, a partic-

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[51] See generally Levinson, Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers, 9 Vand. J. Transnat'l L. 695, 710-12 (1976) (noting that executive orders usually are directives to the bureaucracy, and that proclamations usually address certain private citizens, or the public generally).

[52] See generally S. Wayne, The Legislative Presidency 30-64 (1978).

[53] The term "administrative record" is used here as it is defined in administrative law. See generally, e.g., Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 62-64 (1975).

ular outcome. The White House staff, aware of the policy biases of the agencies, often attempts to compensate by subjecting their recommendations to interagency review.[54] When several agencies having differing orientations are involved in a decision, there may be sharp disagreement, possibly multi-sided, over the best course of action.

Accompanying the policy materials that reach the White House is legal analysis, again from several sources. The interested agencies are likely to provide opinions from their general counsels' offices. Legal analysis from the agencies may conflict regarding the extent of the President's discretion in the matter. Moreover, the White House staff is likely to suspect that the general counsels' work product reflects the orientation of their clients. Accordingly, they turn to lawyers whose client is the President—the Counsel to the President, and, for "outside counsel," the Office of Legal Counsel in the Department of Justice.[55]

While the President's staff reviews and digests the policy and legal materials that were generated in the agencies, a somewhat separate process of policy and legal debate is likely to arise within the White House. Once it becomes known that a presidential decision is near, interested parties of all kinds—agency heads, Congressmen, private parties—may descend on those having an influence on the decision, including the President himself.

When the time arrives for a formal presidential decision, the mechanics are fairly simple, and essentially similar from administration to administration.[56] The White House staff or an agency

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[54] For descriptions of a similar process of interagency review as applied to statutory decisions of the agencies, see ABA Comm'n on Law & the Economy, Federal Regulation: Roads to Reform 84-88 (1979); Bruff, supra note 26, at 464-65.

[55] When a presidential decision will be adopted by executive order or proclamation, an executive order requires it to be submitted in proposed form to the Attorney General "for his consideration as to both form and legality." 1 C.F.R. § 19.2(b) (1980). If disapproved by him, "it shall not thereafter be presented to the President unless it is accompanied by a statement of the reasons for such disapproval." Id. § 19.2(e). The Attorney General's disapproval ordinarily is sufficient to halt any further processing of an executive order or proclamation. Within the Department of Justice, the review function has been delegated to the Assistant Attorney General for the Office of Legal Counsel, 28 C.F.R. § 0.25(b) (1980), who also aids the Attorney General in furnishing general legal advice to the President and the Cabinet. Id. § 0.25(a). See 28 U.S.C. § 511 (1976).

[56] See R. Porter, Presidential Decision Making 65-69 (1980) (Ford); S. Wayne, supra note 52 (F.D. Roosevelt through Ford); Fullington, Presidential Staff Relations: A Theory for Analysis, 7 Presidential Stud. 108, 111 (1977) (Truman, Eisenhower, Johnson, Nixon);

official prepares a decision memorandum for the President, in order to present concisely the major policy options or recommendations that have survived debate within the administration. It usually reflects, although it may not discuss, legal analysis of the extent of permissible discretion under the statute or statutes involved. Each option is likely to be accompanied by outlines of the arguments favoring and disfavoring its adoption. These arguments may be confined to a rather legalistic presentation of relevant policy concerns, or they may branch off into frank discussion of political considerations having little or no legal relevance to the decision. The President reads the memorandum, perhaps discusses it with his advisers, and then decides, usually initialling or marking the options memorandum to indicate his choice. His reasons for selecting a particular option may or may not be those presented by the memorandum, and they may or may not be revealed to his advisers.

Because this process is an informal one not governed by statutory procedures, it is subject to exceptions. Especially when there is pressure to reach a decision on short notice, the process often becomes an almost entirely oral one composed of hurried telephone conversations and meetings between the White House staff and their policy and legal advisers in the agencies. Whether from the press of events or otherwise, some presidential decisions occur without full consultation with the President's lawyers.[57] Indeed, there is sometimes an effort by the White House staff to prevent an interested agency—or even anyone outside a select group of presidential advisers—from knowing that a statutory decision is imminent. The usual motivation for such secrecy is to prevent opposition to, or widespread disclosure of, a policy initiative coming from within the White House. Thus, presidential decisions are sometimes made without knowledge of whether they are legal.

Overall, the process of presidential decisionmaking resembles the process that occurs within an agency as it considers a statutory

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Hoxie, Staffing the Ford and Carter Presidencies, *in* Organizing and Staffing the Presidency 52-53, 65 (B. Nash ed. 1980) (Nixon, Ford, Carter); Wayne, Running the White House: The Ford Experience, 7 Presidential Stud. 95, 96-97 (1977) (Nixon, Ford); Time, Feb. 23, 1981, at 17 (Reagan).

[57] For example, although the process for legal review of proposed executive orders and proclamations described in note 55 supra is followed most of the time, some of these documents are signed by the President without review by the Department of Justice.

decision not governed by special procedural constraints, such as those for adjudication. Agency heads reach their statutory decisions through a process of reading memoranda that summarize vast administrative records, consulting the agency's policy and legal staff, and considering the views of interested persons in the executive branch, Congress, and the private interest groups with which the agency deals.[58] The principal difference in the process at the agency level is that the decisionmaker has a closer day-to-day relationship with the components of the agency that contribute to a decision—and closer administrative supervision over them—than the President can hope to enjoy with any particular agency that might participate in formulating his statutory decisions.

B. The Functional Nature of Presidential Decisions

Substantively, presidential actions implementing statutes fall into two broad functional categories, law-making and law-applying.[59] Presidential law-making is functionally similar to administrative rulemaking, for which the APA provides minimum procedural prerequisites. An agency must usually notify the public of a proposed rulemaking, afford an opportunity for written comment on the proposed rule, and accompany the rule it finally adopts with a statement of its basis and purpose.[60] In practice, these simple requirements have developed into a rather elaborate and time-consuming process that tends to produce a massive public record of information, analysis, and opinion, and that culminates in a detailed explanation of the factual basis and policy rationale for the final rule.[61] In contrast, Presidents perform their rulemaking activ-

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[58] See, e.g., Sierra Club v. Costle, 15 Env't Rep. Cas. (BNA) 2137 (D.C. Cir. 1981). See generally Pedersen, supra note 53.

[59] Although the line between these two categories is indistinct, the essential difference is that law-making actions establish a general policy to govern a class of persons or situations; law-applying actions determine how a general policy should apply to a particular set of facts. See generally, e.g., United States v. Florida E. Coast Ry., 410 U.S. 224, 244-45 (1973); H. Linde, G. Bunn, F. Paff & W. Church, Legislative and Administrative Processes 48-57 (1981).

[60] 5 U.S.C. § 553 (1976). Statutes frequently impose more detailed procedural requisites for rulemaking than those in the APA. See generally Bruff, supra note 26, at 489-90. In the absence of special statutory procedures, courts may not impose procedural requirements for agency rulemaking beyond the APA's minima. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

[61] See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir.) (en banc), cert. denied, 426 U.S.

ities simply by issuing executive orders or proclamations, without any prior public procedure, and often without any accompanying explanation.[62]

Presidential law-applying is functionally similar to "informal" decisionmaking by administrative officials (so called because the APA requires no special procedures for administrative actions other than rulemaking and adjudication).[63] Agencies, under the pressure of judicial review, normally accompany announcements of their informal statutory decisions with explanations similar to those used for rulemaking.[64] Presidents sometimes furnish contemporaneous explanations of their law-applying decisions, but there is no consistent practice.[65]

III. The Applicability of the Administrative Procedure Act to the President

The presidential actions of interest here are procedurally and functionally similar to decisions of cabinet-level administrative officers, for which the APA provides both minimum procedural requirements and a well-understood standard for judicial review. Yet no court has ever held that the President is subject to the APA's requirements.[66] Before analyzing whether the APA should be applied to the President, it is necessary to sketch its pertinent requisites for the agencies.

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941 (1976).

[62] Examples to be discussed here are AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979) (discussed at notes 165-79 & 228-32 infra and accompanying text), and Independent Gasoline Marketers Council v. Duncan, 492 F. Supp. 614 (D.D.C. 1980) (discussed at notes 233-44 infra and accompanying text). See note 55 supra and accompanying text; Levinson, supra note 51, at 710-13. Only one proposed executive order bas ever been published for public comment. See Bruff, supra note 26, at 466 n.72.

[63] See generally Pedersen, supra note 53, at 39-41.

[64] See generally G. Robinson, E. Gellhorn & H. Bruff, The Administrative Process 126-29 (2d ed. 1980).

[65] Examples to be discussed here are No Oilport! v. Carter, 520 F. Supp. 334 (W.D. Wash. 1981) (discussed at notes 180-92 & 213-16 infra and accompanying text); Anaconda Copper Co. v. Andrus, 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980) (discussed at notes 154-64 infra and accompanying text).

[66] 1 K. Davis, Administrative Law Treatise § 1.2, at 8 (2d ed. 1978). But see text accompanying note 110 infra for discussion of dictum in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court), supporting application of the APA to the President.

Under the APA, a court reviewing agency action must first decide whether the action is reviewable at all. The Supreme Court has established a "basic presumption of review," under which "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review."[67] Where review occurs, a court examines agency action for its constitutionality, statutory authorization, procedural regularity, and substantive rationality.[68] The APA's standard of judicial review for rulemaking and for informal agency actions is much the same, except for procedural issues relating to rulemaking.[69]

Constitutional and procedural issues aside, the courts focus on the presence of statutory authority for a challenged action and on the rationality of the judgments of fact and policy that underlie it. On issues of statutory authority, courts often state—but do not always follow—a doctrine that they should defer to an administrator's statutory interpretation within the bounds of reason and ascertainable legislative intent.[70] This deference is based on the administrator's presumed expertise and a related notion that Congress commits these leeway issues (which are intermixed with policy concerns) to the agency and not to the courts.

On issues of fact and policy, the APA requires courts to set aside agency actions that are "arbitrary, capricious, [or] an abuse of discretion."[71] The Supreme Court has parsed this terminology to require a "searching and careful" inquiry into the agency's judgments, although a reviewing court is not to "substitute its judgment for that of the agency."[72] The effort is to ensure that

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[67] Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967). See generally Saferstein, Nonreviewability: A Functional Analysis of "Committed to Agency Discretion," 82 Harv. L. Rev. 367 (1968).

[68] 5 U.S.C. § 706(2)(A)-(D) (1976).

[69] See generally Verkuil, Judicial Review of Informal Rulemaking: Waiting for *Vermont Yankee II*, 55 Tul. L. Rev. 418 (1981).

[70] See, e.g., Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 75 (1975), in which the Court upheld a statutory interpretation by the Environmental Protection Agency: "Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts." See also Regulatory Reform, Hearings Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 22 (1979) (statement of Harold Leventhal); Woodward & Levin, In Defense of Deference: Judicial Review of Agency Action, 31 Ad. L. Rev. 329 (1979).

[71] 5 U.S.C. § 706(2)(A) (1976).

[72] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971).

agency actions are "based on a consideration of the relevant factors"[73] and have a "rational basis" in fact.[74]

Courts exercise this review for statutory authority and rationality by comparing any formal explanation adopted at the time of the decision with the "administrative record" on which the agency based the decision.[75] Substantial indeterminancies attend this process, however. First, administrative records are not self-defining, because there are often no formal agency procedures for determining in advance which documents will be considered in reaching a final decision.[76] Accordingly, efforts to link the morass of documents in an agency with a final decision usually require a process of post hoc reconstruction.

Second, an agency may not provide a formal explanation that suffices to reveal the factual and policy judgments that underlie its decision. The APA does not require formal findings and reasons for informal actions, although it does require the equivalent for rulemaking, in a statement of basis and purpose.[77] To facilitate review, courts frequently have implied requirements for findings and reasons from particular program statutes.[78] Where they have done so, or where administrators have furnished explanations on their own initiative, courts have restricted review to a comparison of the formal explanation with the administrative record. Absent particular indications of "bad faith or improper behavior," the court does not inquire further into the "actual" basis of decision.[79] If the ex-

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[73] Id.

[74] See generally Ethyl Corp. v. EPA, 541 F.2d 1, 34-35 n.74 (D.C. Cir.) (en banc), cert. denied, 426 U.S. 941 (1976) (citing Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 290 (1974)).

[75] E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978).

[76] See generally Pedersen, supra note 53, at 62-64. See also Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721, 723 & n.16 (1975).

[77] 5 U.S.C. § 553 (1976).

[78] See generally G. Robinson, E. Gellhorn & H. Bruff, supra note 64, at 123-29.

[79] [I]nquiry into the mental processes of administrative decisionmakers is usually to be avoided. *United States* v. *Morgan*, 313 U.S. 409, 422 (1941). And where there are administrative findings that were made at the same time as the decision, as was the case in *Morgan*, there must be a strong showing of bad faith or improper behavior before such inquiry may be made.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971).

planation does not sufficiently justify the action on the basis of the administrative record, the usual remedy is a remand to the agency for further consideration.[80]

Scholars have concluded that the APA governs the President;[81] their analysis focuses on the desirability of ensuring judicial review of his actions. That goal can be met without reliance on the APA for authority, however, because Congress meant the Act's judicial review chapter to be a restatement of existing law, not a new departure. The APA did not alter the basic availability and scope of the traditional "nonstatutory" remedies of mandamus, injunction, and declaratory judgment.[82] The United States Court of Appeals for the District of Columbia Circuit has held that mandamus may issue against the President, although the court, in appropriate deference to the Presidency, confined itself to a more politic declaratory judgment.[83] The principal elements of nonstatutory review (mandamus in particular) parallel those contained in the APA: conformity to substantive constitutional and statutory limits, compliance with required procedures, and rationality.[84] Indeed, the drafters of the APA drew these requisites from existing practice.[85]

Whether the APA should apply to the President depends on the extent to which the Presidency is comparable to an administrative agency for purposes of statutory decisionmaking. Certainly some close parallels appear. Many of the decisions that Congress delegates directly to the President could be assigned as appropriately

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[80] In the context of a challenge to a decision by the Comptroller of the Currency, the Court explained that:

> The validity of the Comptroller's action must, therefore, stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration. See *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

Camp v. Pitts, 411 U.S. 138, 143 (1973) (per curiam).

[81] Berger, Administrative Arbitrariness: A Synthesis, 78 Yale L.J. 965, 997 (1969); Davis, Administrative Arbitrariness—A Postscript, 114 U. Pa. L. Rev. 823, 832 (1966).

[82] Attorney General's Manual on the Administrative Procedure Act 93 (1947) [hereinafter cited as APA Manual]. As the Supreme Court has recognized, the Manual is an authoritative source on the APA, and is entitled to some judicial deference. Chrysler Corp. v. Brown, 441 U.S. 281, 302 n.31 (1979). See also note 8 supra (describing nonstatutory review).

[83] National Treasury Employees Union v. Nixon, 492 F.2d 587 (D.C. Cir. 1974). See also Jaffe, The Right to Judicial Review (pt. 2), 71 Harv. L. Rev. 769, 778-81 (1958).

[84] W. Gellhorn, C. Byse & P. Strauss, supra note 8, at 923-30.

[85] APA Manual, supra note 82, at 107-10.

to an agency,[86] and the process preceding a presidential decision is quite similar to that of an agency.[87] Yet there are important differences that legal analysis must take into account: the President's constitutional powers, the multifarious responsibilities of his office, and his direct political accountability as the only elected official with a national constituency.

The President bears substantially more direct political accountability for his own statutory decisions than for those of agency officials. It is true that the President nominates the agency officials to whom the APA applies, and bears responsibility for the overall performance of the executive branch. Nevertheless, the extent to which the President may lawfully supervise a decision allocated by statute to another officer is uncertain, even when the officer is removable at the President's pleasure.[88] Furthermore, as a practical matter no President can hope to give close supervision to all executive branch decisionmaking.[89] Accordingly, his political accountability for any particular agency decision is quite attenuated.

Because of the President's limited accountability for the actions of appointed officials, concern about the legitimacy of subjecting the public to their decisions has long been a central theme in administrative law.[90] It has appeared in such diverse manifestations as the judicial doctrine that Congress may not delegate unrestricted lawmaking power to an agency[91] and Congress's imposition of procedural constraints on the agencies in order to ensure that the public can participate in and influence agency decisions.[92] Because both Congress and the courts have responded to the indirectness of the agencies' political accountability in their efforts to control agency action, existing law merits careful appraisal before

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[86] The President's statutory authority to delegate his statutory powers to other officials, discussed at note 4 supra, recognizes this. Congress does not appear to follow any consistent theory when it decides whether to delegate power to the President or to an agency.

[87] See notes 52-58 supra and accompanying text.

[88] See generally Bruff, supra note 26. Of course, his power to supervise the actions of the independent agencies is subject to still greater doubts and limitations. Id.

[89] See generally W. Cary, Politics and the Regulatory Agencies (1967); Robinson, On Reorganizing the Independent Regulatory Agencies, 57 Va. L. Rev. 947 (1971).

[90] See generally, e.g., J. Freedman, Crisis and Legitimacy, The Administrative Process and American Government (1978).

[91] See United States v. Robel, 389 U.S. 258, 275-77 (1967) (Brennan, J., concurring); Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

[92] See, e.g., Sierra Club v. Costle, 15 Env't Rep. Cas. (BNA) 2137, 2217 (D.C. Cir. 1981). See generally Bruff, supra note 26, at 458-59.

it is applied to the President.

Neither the terminology[93] nor the legislative history[94] of the APA compels the conclusion that it governs the President. Application of the APA to the President might have some unfortunate consequences, because the APA and its judicial gloss do not take account of the special character of the Presidency. As a result, every major aspect of judicial review as it has evolved under the APA seems inappropriate when applied to the President. First, judicial review under the APA does not directly confront the President's constitutional executive privilege, although analogous concepts apply.[95] Second, case law that erects a broad presumption of reviewability for agency action must be narrowed to conform to the cases that directly analyze the substantive reviewability of presi-

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[93] The APA applies to each "agency," a term that ordinarily does not include the President. 5 U.S.C. §§ 551(1), 701(b)(1) (1976). In Soucie v. David, 448 F.2d 1067 (D.C. Cir. 1971), the court interpreted the meaning of "agency" for purposes of the Freedom of Information Act (FOIA), which at the time employed the APA's general definition of the term, and concluded that the President and his immediate aides were not agencies for purposes of FOIA. The court feared that making presidential documents available through FOIA might invade executive privilege. Congress subsequently ratified *Soucie* in the 1974 FOIA amendments, which applied FOIA to the Executive Office of the President, but not to "the President's immediate personal staff or units in the Executive Office whose sole function is to advise and assist the President." H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. 15 (1974), reprinted in [1974] U.S. Code Cong. & Ad. News 6267, 6293. See also Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 156 (1980). The APA does, however, define agency to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," and it specifically excludes Congress and the courts, which suggests that the President is not excepted. 5 U.S.C. §§ 551(1), 701(b)(1) (1976). The legislative history of this terminology, however, reveals that the purpose of the definition is to include subdivisions of agencies (e.g., the Social Security Administration). See generally APA Manual, supra note 82, at 9-10.

[94] The legislative history of the APA nowhere mentions a purpose to bind the President. Indeed, the Final Report of the Attorney General's Committee on Administrative Procedure, which was influential in the genesis of the APA, concluded that a generally applicable statute should not include the President:

> From the earliest times Congress has conferred upon the President powers which differ importantly from those [of the agencies]. . . . Instead of being simply one of continuous, integrated regulation, such as most of the regulatory bureaus and commissions undertake [the President's powers] involve isolated or temporary authority to deal with emergency situations and often the determination of high matters of state. . . . [T]he very emergency character of the situations makes inapplicable the procedures evolved for dealing with the normal regulations promulgated by administrative agencies in the performance of their duties.

S. Doc. No. 8, 77th Cong., 1st Sess. 100-01 (1941). See generally G. Rohinson, E. Gellhorn & H. Bruff, supra note 64, at 35.

[95] See notes 193-212 infra and accompanying text.

dential action.[96] Third, the process of statutory interpretation acquires unique features when the President is involved, due to interrelationships between issues of statutory and constitutional power.[97] Fourth, application of the APA to the President would subject him to procedural requisites designed to ensure responsiveness of appointed officials to the public.[98] Finally, courts reviewing agency actions for substantive rationality often employ a "hard look" doctrine that closely analyzes the persuasiveness of the agency's judgments of fact and policy on the basis of the administrative record.[99] This substantial gloss on the underlying principle that executive action must have a rational basis may be inappropriate for presidential actions, in view of the burdens on the decisionmaking process that it imposes and the lesser need for close substantive review of a politically accountable official.

Rather than risk creating distortions in the case law for both the President and the agencies by subjecting them to the same procedures and standard of review, it seems best to fashion a method for review of presidential decisions that is expressly tailored to the unique character of his office. The courts can find the necessary justification for this enterprise in the set of traditional principles for judicial review of executive action that trace from *Marbury*. Prescribing a standard for judicial review of the President's statutory actions thus requires consideration of each of the techniques that courts have used to conform executive action to law. Because of the similarities between presidential and agency actions and the roots of the APA in existing law, a process similar but not identical to that found in the APA cases should emerge.

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[96] Compare note 67 supra and accompanying text (discussing the "basic presumption of review") with note 205 infra and accompanying text (discussing contexts where courts have found no role for judicial review).

[97] See notes 39-50 supra, 137-53 infra and accompanying text.

[98] Thus, the President's law-making activities would be subject to the APA's notice and comment procedures. Although many of his executive orders would be within exceptions to this requirement, e.g., under 5 U.S.C. § 553(a) (1976), no procedures are required for rulemaking relating to "military or foreign affairs" functions, or to "agency management or personnel or to public property," its extension to the President could be more cumbersome than salutary, and ought not to occur without explicit legislative consideration.

[99] See, e.g., Sierra Club v. Costle, 15 Env't Rep. Cas. (BNA) 2137 (D.C. Cir. 1981). See generally Rodgers, Benefits, Costs and Risks: Oversight of Health and Environmental Decisionmaking, 4 Harv. Envtl. L. Rev. 191 (1980).

IV. The Delegation Doctrine

The delegation doctrine is a traditional limit on congressional attempts to transfer policymaking authority to the President. Early on, the Supreme Court stated, but did not follow, a rigid principle that the separation of powers forbade Congress to delegate any of its law-making power to the President.[100] This principle was untenable because the application of statutory directives to particular fact situations, which is at the core of the executive function, unavoidably involves policymaking of a kind that the legislature could also perform by providing greater particularity in its statutory commands. Under the pressure of necessity, the delegation doctrine evolved into its modern form, which requires only that Congress propound a policy standard intelligible enough to provide guidance to the executive in implementing the law. A primary purpose of the standards requirement is to facilitate judicial review of the executive's actions under the governing statute. The statutory standard is a benchmark against which the courts—and Congress and the public as well—can assess the legality of executive action.[101]

Although it has surface appeal, the standards requirement has proven ineffectual as a means to force Congress to state intelligible limits when it grants power to the executive.[102] Essentially meaningless statutory commands to act in the public interest have been upheld by the courts.[103] In *FEA v. Algonquin SNG, Inc.*,[104] for example, the Court found no infirmity in the Trade Expansion Act, which authorizes the President to restrict imports to protect "national security." The Court noted that the Act articulated a "series of factors to be considered by the President;"[105] the factors themselves, however, are so broadly stated that they provide little con-

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[100] See generally G. Robinson, E. Gellhorn & H. Bruff, supra note 64, at 44-46.

[101] Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part).

[102] Except for two celebrated New Deal cases that struck down congressional delegations of power to the President because of insufficient standards, the Court has never invoked the doctrine to invalidate a statute delegating power to a federal officer. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[103] See generally G. Robinson, E. Gellhorn & H. Bruff, supra note 64, at 57-61.

[104] 426 U.S. 548 (1976).

[105] Id. at 558-60.

straint.[106] Thus, the modern formulation of the delegation doctrine, although still stated by the Court, is honored mainly in the breach.[107]

Despite its weaknesses, the doctrine has had some salutary effects. There are signs that it is evolving from a narrow focus on the presence or absence of statutory standards to a more broadly-based search for the presence of sufficient constraints to protect against executive arbitrariness. The leading case is *Amalgamated Meat Cutters v. Connally*,[108] which upheld the Economic Stabilization Act of 1970's[109] very broad grant of authority to the President to stabilize wages and prices. The court also upheld President Nixon's executive order invoking the Act, which froze wages and prices for ninety days and delegated enforcement to the Cost of Living Council. In addition to finding policy standards in the statute and its legislative history, Judge Leventhal based the decision on a variety of statutory limits on executive discretion: the limited duration of the authorization, the presence of statutory requirements for agency procedures, the availability of judicial review, and an implied requirement that those implementing the program form subsidiary administrative policy, thereby confining their own discretion. Because the Economic Stabilization Act did not provide for either mandatory procedures or judicial review, the court drew these protections from the APA.

The court's approach in *Meat Cutters* surely owed something to the fact that the President had already delegated implementation of the program to a subordinate agency. Although the court was inclined to the view that the APA applied to the President himself, it was necessary only to hold that it applied to the Council, a much less controversial conclusion.[110] Moreover, it is unlikely that the court would have implied a statutory requirement for the continuing formation of administrative policy if the President himself had

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[106] Id. at 551 (citing 19 U.S.C. § 1862(c) (1976)). The statutory factors do evince a policy of economic protectionism, which is perhaps implicit in an authorization to restrict imports. They instruct the President "in the light of the requirements of national security and without excluding other relevant factors," to consider such matters as the effects of imports on domestic production.

[107] For a recent discussion, see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 672-88 (1980) (Rehnquist, J., concurring).

[108] 337 F. Supp. 737 (D.D.C. 1971) (three-judge court).

[109] 12 U.S.C. § 1904 note (1976).

[110] 337 F. Supp. at 761.

been the decisionmaker—the implications for intrusion on the President's manifold constitutional duties are obvious.[111] Therefore, although *Meat Cutters* took a flexible approach to ensuring the accountability of administrative action through use of the delegation doctrine, its direct value in furnishing precepts for the doctrine's application to the President is limited.

In general, therefore, the delegation doctrine's present utility as a meaningful restraint on Congress is low. Recent years have seen increasing calls for its revival, in order to force Congress to discharge its constitutional responsibilities by forming basic policy.[112] Reviving the doctrine for statutes delegating power to the President would be unwise, however. Some of the reasons for this conclusion are relevant whether the delegation is to the President or to an agency. The courts are properly reluctant to employ the doctrine vigorously, in part because it involves a constitutional decision that overrides a congressional judgment regarding the amount of discretion that should be accorded the executive in a particular context. Moreover, the doctrine may foster judicial subjectivity, because no one has articulated neutral principles for deciding how specific a particular delegation should have to be.[113] Finally, invocation of the doctrine to invalidate a statute invites a judicial confrontation with Congress, which may be unwilling or unable to articulate precise standards. In short, the delegation doctrine, which was designed to help maintain the separation of powers between Congress and the executive, fails because it requires courts to assume a role that they sense oversteps separation of powers limits on their own relationship with Congress.

A revived delegation doctrine would create special problems were courts to apply it to statutes granting power to the President. First, broad delegations to the President are often entirely appro-

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[111] Professor Davis's suggestion that the delegation doctrine be replaced by a requirement that administrators confine their own discretion through affirmative policymaking thus does not seem appropriate for the President. See generally 1 K. Davis, supra note 66, § 3.15. For a discussion of the possibilities of presidential self-regulation through rulemaking (although not as a means to replace the delegation doctrine), see Levinson, supra note 51.

[112] See note 107 supra. See also J. Ely, supra note 27, at 131-34; T. Lowi, The End of Liberalism 146, 154-56, 297-99 (1969); Gewirtz, The Courts, Congress, and Executive Policymaking: Notes on Three Doctrines, 40 Law & Contemp. Probs. 46 (1976); Wright, Beyond Discretionary Justice, 81 Yale L.J. 575, 582-87 (1972).

[113] For some tentative efforts to identify such principles, see J. Freedman, supra note 90, at 80-86; G. Robinson, E. Gellhorn & H. Bruff, supra note 64, at 71-72.

priate or even necessary[114]—his emergency statutory powers are an obvious example.[115] Indeed, where the President has independent constitutional powers, as in foreign affairs, Congress may doubt its authority to bind him closely. Moreover, the accountability concerns at the center of the delegation doctrine are partially met when a grant of power is to the President himself, with his direct political responsibility. Although the doctrine's purpose of keeping policymaking in *Congress* is not met, at least delegations to the President do not transfer responsibility to an appointed bureaucrat.[116] Furthermore, the ultimate power to intervene to correct overenthusiastic presidential initiatives remains with Congress.[117]

It is possible to make too much of this point, however. The Constitution's checks on the legislative process are weakened if Congress may delegate power without restriction. The effect is to shift the burden of overcoming institutional inertia from the initial formation of policy through legislation to the generation of legislation to override a presidential initiative. Notwithstanding Congress's assent to it, this effect is deleterious to the policymaking process that the Constitution envisions. The Framers designed their checks on the legislative process not only to control Congress but also to minimize the amount of lawmaking to which the public would be subjected.[118] By transferring broad authority to the executive, which has fewer internal impediments to forming decisions, Congress increases the amount of lawmaking that is likely to occur.[119]

Nevertheless, the courts can do no more than to hold the delegation doctrine in reserve in case of a particularly egregious congressional abdication of power to the President, and to follow the lead of *Meat Cutters* in taking into account all available controls on executive discretion. Among these controls is statutory interpretation, a judicial function that is made both more important and more difficult to exercise by the delegation doctrine's failure to

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[114] See, e.g., Zemel v. Rusk, 381 U.S. 1, 17 (1965); United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319-22 (1936).

[115] E.g., International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1706 (Supp. III 1979).

[116] See, e.g., J. Ely, supra note 27, at 131-34 (stressing the need to assure political accountability of policymaking).

[117] Arizona v. California, 373 U.S. 546, 594 (1963).

[118] See The Federalist No. 73, at 470 (B. Wright ed. 1961) (A. Hamilton).

[119] For a discussion of ways in which the bureaucracy creates internal checks on presidential decisions, see notes 52-58 supra, 256-57 infra and accompanying text.

provide an effective means to force Congress to set policy standards for executive action.

V. Statutory Interpretation

One proposed alternative to the delegation doctrine is that the courts apply a technique of narrow construction to invalidate executive initiatives under very broad delegations until Congress provides the necessary explicit authority.[120] This proposal recognizes that courts have sometimes avoided an issue under the delegation doctrine by interpreting a statute narrowly.[121] This use of the doctrine arose in cases also presenting another constitutional issue if the statute were interpreted broadly. For example, in *Kent v. Dulles*,[122] the Court narrowed the Secretary of State's authority to deny passports on grounds of political beliefs in order to avoid issues under both the delegation doctrine and the right to travel.

Although offered as a less disruptive technique than invalidation of a statute, this approach would produce its own mischief if applied to statutory delegations to the President. Some of the institutional problems that would result are the same as those fostered by the delegation doctrine, which this approach closely resembles. It is often appropriate to delegate broad discretion to the President; moreover, the presence of his independent constitutional powers may deter or disable Congress from imposing close constraints.

Narrow construction would create some unique problems as well. First, unless courts are simply to hold every presidential initiative under a broad delegation to be unauthorized, which would effectively overturn the statute, they would have to articulate some definite bounds for presidential action. Yet when the only possible constitutional infirmity in a statute is a failure to meet the delegation doctrine itself, courts are likely to lack a principled basis on which to narrow the statute.[123] By definition, the context is one of

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[120] Gewirtz, supra note 112, at 65-80.

[121] The leading cases are National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); Zemel v. Rusk, 381 U.S. 1 (1965); Kent v. Dulles, 357 U.S. 116 (1958).

[122] 357 U.S. 116 (1958).

[123] Professor Gewirtz suggests applying the technique only to "major" policy initiatives. Gewirtz, supra note 112, at 66, 76-77. This obviously is a subjective standard; presumably it would affect most presidential actions, as few decisions seem minor when invested with the prestige of the Presidency.

a broad, perhaps nearly unconfined, grant of power. A court would risk intruding deep into the policymaking role confided to Congress by the Constitution if it were to adopt an artificial interpretation of a statute in an effort to "avoid" the constitutional issue. Moreover, a confining interpretation may deprive the President of a legitimate need for flexibility to respond to future events.

Second, this approach fails to recognize that the broadest statutory delegations to the President often involve matters that are not judicially reviewable because they are committed to the political branches. For example, in *Algonquin SNG*,[124] the Court declined an invitation to avoid a delegation doctrine issue by narrowing the Trade Expansion Act's authorization to restrict imports to protect "national security." The Court may have been responding to doubts that it should attempt to define the statutory terms narrowly in view of the foreign policy aspects of import restrictions.[125] In short, if courts were to attempt to formulate statutory standards more precise than those explicitly supplied by Congress, they would often do so in a context where judicial competence is at a minimum.

Third, narrow construction would deprive the courts of a valuable technique for upholding implicit accommodations of power between Congress and the President. The theory is that presidential authority can sometimes be found in congressional acquiescence in an established executive practice. This "acquiescence doctrine," which is analyzed below,[126] enables the courts to avoid deciding difficult issues at the margin of the President's constitutional powers. Narrow construction, in contrast, could impel Presidents deprived of statutory arguments to press broad claims of constitutional power on the courts in support of their actions.

Thus, instead of reducing institutional difficulties created by the delegation doctrine's weaknesses, a narrow construction approach

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[124] See notes 104-06 supra, 233-39 infra and accompanying text.

[125] Similarly, in *Meat Cutters*, the sharpest challenge to a broad delegation concerned the timing of wage-price controls, a matter Congress had left to the President. The court held this broad delegation to be appropriate because considerations of international finance could determine timing. The court recognized that Congress could not be specific here; it might have added that its own review of the President's compliance with the statute would probably be disabled by those same considerations. See notes 108-11 supra, 205-06 infra and accompanying text.

[126] See notes 137-53 infra and accompanying text.

would threaten to transgress separation of powers limits on judicial review. The approach should be confined to the context where it arose—cases presenting a constitutional issue other than the breadth of statutory delegation.[127]

By the same token, courts should not go to the opposite extreme of routinely upholding any presidential action not clearly barred by statute, thereby allowing the President to occupy all of Justice Jackson's "zone of twilight"[128] on the presumed authority of his aggregated constitutional and statutory powers. The rationale for so deferential an approach would be to spare the courts the travails of drawing borderlines in the murky area between the legislative and executive spheres, leaving it to Congress to intervene if it desires to restrict the President. As noted above,[129] with the failure of the delegation doctrine it is necessary (if often undesirable) for the courts to allow Congress to *grant* broad consent to executive policymaking that can be retracted only if Congress can muster the votes to pass legislation. It would place a far greater burden on Congress, however, to require that it always speak explicitly in order to *deny* a President the authority to act. Such an approach would ignore inherent limits on the capacity of legislation to prescribe explicit directions for implementation. Moreover, there are relatively few statutory limits on the President's discretion; Congress often doubts the wisdom of binding him closely in advance. Consequently, the President usually has ample opportunity to craft an action that escapes any explicit limits.[130] The courts would cede too much of Congress's power to the President were they to forgo inquiry into implied limits to the President's statutory au-

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[127] See Kent v. Dulles, 357 U.S. 116 (1958) (discussed at note 122 supra and accompanying text); Cole v. Young, 351 U.S. 536 (1956) (where the Court, by narrowly construing statutory authority, invalidated an executive order that established summary procedures to dismiss government employees for national security reasons; first amendment and due process concerns were present). Haig v. Agee, 101 S. Ct. 2766 (1981), upholding the Secretary of State's power to revoke passports for national security reasons, may not be entirely consistent with *Kent* and *Cole*, at least in spirit. See 101 S. Ct. at 2786-88 (Brennan, J., dissenting). Agee's conduct, however, surely was within any legitimate revocation power; it is the Court's unconditional approval of the underlying regulation that gives pause.

[128] See note 45 supra and accompanying text.

[129] See notes 114-15 supra and accompanying text.

[130] See, e.g., Independent Gasoline Marketers Council v. Duncan, 492 F. Supp. 614 (D.D.C. 1980) (discussed at notes 233-44 infra and accompanying text); AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979) (discussed at notes 165-79 & 228-32 infra and accompanying text).

thority. The result would be to realize Theodore Roosevelt's expansive theory of presidential power,[131] which fails to recognize the subtlety of the process by which Congress confers or withholds its assent to presidential action. That process is analyzed below.[132]

In defining the President's statutory powers according to both express and implied congressional policies, courts must decide what deference to give to the President's interpretation of the governing statute. Courts reviewing agency actions defer to reasonable statutory interpretations, in part because of the agency's presumed expertise.[133] Admittedly, the political appointees who head the agencies are frequently without significant expertise when appointed. With time, however, agency heads do acquire expertise through immersion in a relatively confined set of responsibilities and close daily contact with an expert staff.[134] By contrast, Presidents are supremely generalists; they have a more attenuated relationship than agency heads with the sources of expertise in the bureaucracy, although the work product of the bureaucracy is available to them.[135] For both Presidents and agency heads, however, statutory decisionmaking is a mixture of judgments of fact, policy, and law, whose constituent elements do not separate neatly. Recognition of the tendency for issues of law to be intertwined with policy concerns is a second reason for judicial deference to an administrator's statutory interpretation. On this score, the President has a better claim to deference than an agency head, because of his special political and constitutional status. The latitude accorded the President by present techniques of statutory interpretation may reflect an unspoken tradition of deference that stems from his political accountability. In any event, courts should defer to presidential statutory interpretations that are reasonable and consistent with ascertainable legislative intent, much as they do for agency heads.

The process of statutory interpretation in cases involving presidential action often is markedly more complex and indeterminate than for review of an agency decision, because a number of statutes

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[131] See note 16 supra and accompanying text.

[132] See notes 137-53 infra and accompanying text.

[133] See note 70 supra and accompanying text.

[134] See note 58 supra and accompanying text.

[135] See notes 52-55 supra and accompanying text.

and the President's constitutional powers are likely to be at least tangentially relevant. There are three related levels of analysis, which correspond closely to Justice Jackson's famous identification of the issues surrounding the legislative-executive relationship.[136] The first, and most familiar, is a search for express or implied statutory authority for the action in question; it resembles the one employed for agency actions. The second level of inquiry comes into play when there is no sufficient statutory authority for the action. This is a broad-based search for congressional acquiescence in an established executive practice; the court considers both the implications of statutes that do not actually authorize the action in question and the President's constitutional power, without relying on either exclusively.[137] The third level of inquiry examines whether the President possesses constitutional power that can be exercised unless Congress intervenes; statutory interpretation comes into play only to determine whether Congress has forbidden the action taken.[138]

An example of the interplay among these inquiries and some guidance for their application are provided by the Supreme Court's recent decision in *Dames & Moore v. Regan*[139] upholding the executive agreement and related executive orders that settled the Iranian hostage crisis. To the Court, the most difficult issue was the extent of the President's power to suspend claims against the Iranian government pending in court and to refer them to an international tribunal created by the agreement. The Court first sought explicit statutory authority for this exercise of claims settlement power, either in the International Emergency Economic Powers Act[140] or in the Hostage Act,[141] but could find none. The Court conceded that the latter was phrased broadly enough to apply, but concluded that it was directed at a problem unlike the Iranian crisis, and that it did not clearly contemplate measures such as those

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[136] See note 45 supra and accompanying text.

[137] See generally, e.g., Dames & Moore v. Regan, 101 S. Ct. 2972 (1981).

[138] See notes 40-42 supra and accompanying text.

[139] 101 S. Ct. 2972 (1981).

[140] 50 U.S.C. §§ 1701-1706 (Supp. III 1979) (granting the President broad powers over property owned by foreign nations and persons in times of national emergency).

[141] 22 U.S.C. § 1732 (1976) (authorizing the President to use "such means, not amounting to acts of war, as he may think necessary and proper" to effectuate the release of Americans held wrongfully by a foreign government).

at issue. Nevertheless, the Court found these statutes relevant in the "looser sense of indicating congressional acceptance of a broad scope for executive action in circumstances such as those presented."[142] The Court concluded that, in the absence of any indication of contrary legislative intent, the presence of a broad statutory authorization in a field closely related to the one in question could "invite" the President to take action on his own.[143]

Turning to the question of congressional acquiescence in presidential settlement of claims, the Court found that since 1799 Presidents had engaged in a consistent, although not exclusive, practice of settling the claims of American citizens against foreign governments by executive agreement rather than by treaty. Congress, obviously aware of the practice, repeatedly had passed legislation designed to facilitate access of American claimants to funds obtained for them by the President, but had never sought to restrict or to forbid the practice itself.[144] Moreover, the Court itself had recognized "that the President does have some measure of power to enter into executive agreements"[145] settling claims, a power apparently implied from the Constitution's grants to him of various powers over foreign affairs.[146]

Dames & Moore is the latest Supreme Court case upholding presidential action in the "zone of twilight" where the Court could

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[142] 101 S. Ct. at 2985.

[143] [The] failure of Congress specifically to delegate authority does not, "especially . . . in the areas of foreign policy and national security," imply "congressional disapproval" of action taken by the Executive. *Haig v. Agee*, _ U.S. _ (1981). On the contrary, the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to "invite" "measures on independent presidential responsibility." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). At least this is so where there is no contrary indication of legislative intent and when, as here, there is a history of congressional acquiescence in conduct of the sort engaged in hy the President.

Id. at 2986 (parallel citations omitted).

[144] The plaintiffs argued that Congress divested the President of the power to settle claims when it passed the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1976), which granted the federal courts jurisdiction to entertain some suits against foreign governments. The Court disagreed, reasoning that the Act was designed "to remove one particular barrier to suit," 101 S. Ct. at 2990, and noting that the same Congress had rejected proposals to limit the President's power to enter into executive agreements. Id.

[145] 101 S. Ct. at 2988.

[146] United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937).

find congressional acquiescence in the executive practice.[147] As a way of appraising whether Congress has consented to a practice without actually passing legislation to authorize it, the doctrine demands sensitive application, lest it become an excuse for upholding any presidential action not explicitly forbidden by statute. The doctrine is a major contribution to separation of powers analysis because it enables courts to avoid rendering direct definitions of the President's "inherent" or implied powers when it is not necessary to do so.[148] The risk that a decision upholding presidential action will spur later executive adventurism or will disable Congress from legislating on the subject is thereby minimized. By not defining precisely the borderline between presidential and congressional authority, the doctrine preserves valuable flexibility in the operation of our constitutional scheme.

There should be limits to the doctrine's applicability, however—the countervailing consideration to flexibility is the value of identifying relatively clear spheres of responsibility for the branches.[149] The courts should be willing to regard some presidential practices as having so ripened into implied constitutional power that Congress must legislate explicitly to restrict them. The effect would be to increase the law's predictability, without denying the presence of shared authority between Congress and the President. Perhaps the Court should have taken this approach in *Dames & Moore*—the question requires a careful appraisal of the

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[147] As the Court summarized the doctrine:

> As Justice Frankfurter pointed out in *Youngstown*, 343 U.S. at 610-611, "a systematic, unbroken executive practice, long pursued to the knowledge of Congress and never before questioned . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II." Past practice does not, by itself, create power, but "long-continued practice, known and acquiesced in by Congress, would raise a presumption that the [action] has been [taken] in pursuance of its consent. . . . " *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915). See *Haig v. Agee*, _ U.S. at _.

101 S. Ct. at 2990 (parallel citations omitted).

[148] The Court's manifest caution in *Dames & Moore* was probably due to the haste in which the litigation was conducted, the thin textual basis for the President's claims settlement practice, and the Court's wish to set a narrow precedent in order to keep the practice confined in the future. See id. at 2991.

[149] Thus, *Dames & Moore*, by its emphasis on congressional acquiescence in presidential claims settlement, opens the door to arguments that a later settlement has been undermined by some tangential statute. See note 144 supra for one example of such an argument.

claims settlement practice itself.[150] Nevertheless, because the case was litigated in the haste that so often attends judicial analysis of presidential power,[151] it is difficult to fault the Court for its caution.

On the whole, *Dames & Moore* is a sensitive application of the acquiescence doctrine that contains several lessons of general applicability to issues of statutory interpretation. First, by declining to rest its decision on the sweeping language of the obscure Hostage Act, which had not been invoked for over a century,[152] the Court sounded a note of caution to future executive advisers who might counsel reliance on literal statutory terminology, wherever found. Second, the Court was careful to identify the context of the President's action as one in which Congress traditionally had not exercised close control, so that the absence of explicit authority carried no negative implications. Third, the Court's finding of congressional acquiescence in the claims settlement practice was well supported both by the consistency and visibility of presidential action and by the relative unambiguousness of closely relevant statutory responses. Where executive practice lacks either consistency or visibility, or where congressional reaction to it is ambiguous, courts should not find acquiescence in the practice.[153]

It remains to apply the principles elaborated so far to two examples of presidential decisions that relied exclusively on statutory power. The first, *Anaconda Copper Co. v. Andrus*,[154] involved presidential law-applying under a broad delegation. The Antiquities Act of 1906[155] authorizes the President "in his discretion, to declare by public proclamation . . . objects of historic or scientific interest" on the federal lands to be national monuments, by reserv-

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[150] Before *Dames & Moore*, many considered the President's claims settlement authority to be settled (at least absent affirmative congressional intervention) on the authority of cases cited at note 146 supra.

[151] See United States v. Nixon, 418 U.S. 683 (1974); New York Times Co. v. United States, 403 U.S. 713 (1971); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[152] See note 141 supra.

[153] In Haig v. Agee, 101 S. Ct. 2766 (1981), the Court based a finding of congressional acquiescence on a longstanding executive *interpretation* of a statute, accompanied by only occasional instances of a practice consistent with it. As the dissent pointed out, there is far less practical impetus in Congress to override an executive interpretation of a statute than an actual administrative practice relying on the interpretation. Id. at 2786 (Brennan, J., dissenting).

[154] 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980).

[155] 16 U.S.C. § 431 (1976).

ing parcels that "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." The Act establishes no special procedures for the decision to declare a national monument;[156] it contains no provision for judicial review.

In 1978, President Carter invoked the Antiquities Act when he reserved about 55,000,000 acres of land in Alaska by creating or enlarging national monuments there.[157] The President accomplished this by issuing seventeen proclamations that had been prepared, at his request, by the Departments of Agriculture and the Interior.[158] Each proclamation contained several paragraphs that described the objects of special interest in the lands covered.[159]

The Anaconda Copper Company and other parties, including the State of Alaska, challenged the President's action in court on grounds that the proclamations contravened both the Act's definition of the objects eligible for designation as monuments and its limitation on their size. The court granted the Government's cross-motion for summary judgment.[160] It found that Presidents consistently had interpreted the terms "historic or scientific interest" broadly, that the Supreme Court had approved that practice,[161] and that Congress, well aware of this executive practice, had at

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[156] In Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978), the court held that the environmental impact statement requirements of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4361 (1976), do not apply to presidential actions under the Antiquities Act. The court may have been influenced by the fact that the Interior Department had prepared NEPA statements for various policy options, including presidential withdrawal of lands under the Act.

[157] The President acted following Congress's failure to pass his legislative proposals on the disposition of Alaskan lands. Some of the lands had been withdrawn from development by administrative orders that were soon to expire; hence the need for prompt action. See generally Alaska v. Carter, 462 F. Supp. 1155, 1156-60 (D. Alaska 1978). For the text of the President's request to Secretary of the Interior Andrus for recommendations on the problem, with particular emphasis on "the suitability of the lands for designation as national monuments under the Antiquities Act of 1906," see id. at 1160 n.10.

[158] The proclamations had been reviewed by the Office of Legal Counsel (OLC) and approved as to form and legality, see note 55 supra; as usual, the memoranda commmicating OLC's legal views to the President were not made public. The Agriculture Department's proclamations (for Admiralty Island and Misty Fiords) covered lands within the national forest system.

[159] 43 Fed. Reg. 57,009-132 (1978).

[160] 14 Env't Rep. Cas. (BNA) at 1855. Only 3 of the 17 monuments were challenged. See note 162 infra.

[161] The court cited Cappaert v. United States, 426 U.S. 128 (1976) (Devil's Hole), and Cameron v. United States, 252 U.S. 450 (1920) (Grand Canyon).

least acquiesced in it despite ample opportunities to impose constraints while legislating in the field. The court concluded that objects of geological or ecological interest could be designated monuments; it considered the proclamations sufficient on their face to meet this standard.[162]

The context of *Anaconda Copper* was similar to that in *Dames & Moore*: an established presidential practice clearly known to and accepted by Congress, and supported by Supreme Court precedent. There is an important analytic difference between them, however. *Dames & Moore* was a gloss on the President's implied constitutional powers, whereas *Anaconda Copper* was a gloss on a venerable statute. When a presidential decision can rest partly on constitutional authority, courts can feel reasonably free to draw some support for the decision from the penumbras of statutes. When the only authority is statutory, however, there is a risk that a similar technique will replace a principled search for implied authority with a grant of a "roving commission"[163] to the executive. Nevertheless, *Anaconda Copper* seems only a modest step beyond the recognized technique of interpreting statutes to incorporate administrative practice existing at the time of enactment as a general guide to authorized policymaking discretion.[164] *Anaconda Copper*'s added element is the willingness to read significance into congressional inaction when a visible executive practice, supported by judicial precedents, is not disturbed by Congress when it revises the statutes that govern closely related matters.

Thus, *Anaconda Copper* recognizes that an initially vague stat-

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[162] Of the three challenged monuments, one—Admiralty Island—was an easy case, as it included archeological and historical sites. The other two—Gates of The Arctic and Yukon Flats—contained only items of geological and ecological interest. The court clearly was more troubled by these two proclamations, but upheld them, reserving factual issues such as the size of the monuments for later determination. The challenged proclamations were supported by administrative records that varied widely in comprehensiveness. The Interior Department had prepared a multi-volume study of the proposed monuments under its jurisdiction (including Gates of the Arctic and Yukon Flats), identifying their objects of interest under the Act; the Agriculture Department had produced a far less detailed record concerning the proposed monuments under its jurisdiction (including Admiralty Island). The issues of fact were never decided—Congress ultimately disposed of the lands through legislation. Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

[163] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring) (invalidating a very broad statutory delegation of power to the President).

[164] See, e.g., Zemel v. Rusk, 381 U.S. 1 (1965); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court).

ute can gain content over time through the interplay of executive and congressional action; accordingly, it is one way to cure a possible delegation doctrine infirmity. Nevertheless, problems of limits remain. In *Anaconda Copper,* the scale of the President's action exceeded anything done previously under the Antiquities Act. The court should have considered whether the President thereby had exceeded the bounds of implied congressional consent. This inquiry would recognize that once courts approve a practice as authorized by implication, Presidents may be tempted to test the outer limits, as the following example of presidential law-making demonstrates.

The Federal Property and Administrative Services Act (FPASA)[165] presents a rather mundane appearance: in pursuit of an "economical and efficient system" of procurement,[166] it grants the President a vague authorization to "prescribe such policies and directives, not inconsistent with the provisions of this Act, as he shall deem necessary to effectuate the provisions of said Act."[167] Presidents have successfully rested two major policy initiatives seeking goals substantially removed from procurement on this slender authority. The first consisted of a series of executive orders prohibiting discrimination in government contracting.[168] The federal courts have upheld this presidential program on a procurement-related ground—the interest "in assuring that the largest possible pool of qualified manpower be available"[169]—and on a broader ground of implied congressional authority, drawn from the continuation of appropriations for projects subject to the orders.[170]

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[165] Codified at scattered sections of 40, 41, 44 & 50 U.S.C. (1976).

[166] 40 U.S.C. § 471 (1976).

[167] Id. § 486(a).

[168] See generally Brody, Congress, The President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers, 60 B.U.L. Rev. 239 (1980); Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U. Chi. L. Rev. 723 (1972). In Chrysler Corp. v. Brown, 441 U.S. 281, 304-08 (1979), the Court noted the debate over the validity of the orders, and declined to hold that they authorized disclosure of certain documents "as provided by law" under 18 U.S.C. § 1905 (1976).

[169] Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 171 (3d Cir.), cert. denied, 404 U.S. 854 (1971).

[170] The Supreme Court since has taken a restrictive approach to implying approval of substantive administrative action from appropriations measures. TVA v. Hill, 437 U.S. 153, 190 (1978). In Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971), the court said at one point that presidential action not forbidden by Congress would be valid, 442 F.2d at 171, a statement suggestive of the broadest

Encouraged by this judicial willingness to uphold creative presidential uses of the procurement authority, President Carter issued an executive order requiring that government contractors adhere to "voluntary" wage and price standards issued by the Council on Wage and Price Stability.[171] In a brief preamble typical of executive orders, the President cited his constitutional and statutory powers, including those conferred by the FPASA, and identified his purpose as to foster procurement "at prices and wage rates which are noninflationary."[172]

Union plaintiffs sought declaratory and injunctive relief against implementation of the program, and prevailed in the district court.[173] In *AFL-CIO v. Kahn*,[174] the court of appeals reversed this decision; it found a "sufficiently close nexus" between the purposes of the FPASA and the executive order to uphold the President's action. Having taken a broad view of presidential authority under the FPASA, a statute related at best only indirectly to wage and price controls, the court then took a far more literal approach to a statute that was more on point, the Council on Wage and Price Stability Act (COWPSA).[175] The court of appeals rejected the argument that had prevailed in the district court, that Congress had prohibited the program when it explicitly denied the Council any authority to impose mandatory wage-price guidelines. The court concluded that the President's program was insufficiently coercive to run afoul of the statutory proscription, and noted that Congress had continued to fund the Council after the program's inception.

AFL-CIO v. Kahn raises the question of whether there are any limits to the capacity of the executive to employ procurement law

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views of presidential power. See note 16 supra and accompanying text.

[171] Exec. Order No. 12,092, 43 Fed. Reg. 51,375 (1978).

[172] "By the authority vested in me as President and as Commander in Chief . . . by the Constitution and statutes . . . including . . . the Council on Wage and Price Stability Act . . . and . . . the Federal Property and Administrative Services Act. . . . " Id., 43 Fed. Reg. at 51,375. In the ensuing litigation, however, the President relied solely on statutory authority.

[173] AFL-CIO v. Kahn, 472 F. Supp. 88 (D.D.C. 1979). The court found that wage and price controls had always been based on explicit statutory authority, and that the President's program fell within a recent statutory proscription of mandatory controls.

[174] 618 F.2d 784 (D.C. Cir.) (en banc), cert. denied, 443 U.S. 915 (1979).

[175] 12 U.S.C. § 1904 note (1976). The court took Congress at its word: COWPSA, the court said, provided that " '[n]othing in *this* Act . . . authorizes . . . mandatory economic controls.' " 618 F.2d at 795 (quoting 12 U.S.C. § 1904 note (1976)) (emphasis added by the court).

for unrelated purposes until Congress legislates to forbid the practice. The court gave short shrift to the consistent congressional practice of explicitly conferring or withdrawing wage-price authority by statute.[176] This practice should have prevented the court from providing the otherwise absent authority by drawing generous powers from procurement law. The precedents for reading the FPASA broadly, which involved cases contesting the civil rights executive orders, should not have been applied to this quite different context. For the same reason, the court should have read the explicit denial of wage-price authority in COWPSA to have implications beyond the four corners of that statute. Its reason for declining to do so was that Congress, aware that the Council was implementing the President's program, extended the agency's life and greatly increased its budget.[177] The court should have heeded a recent Supreme Court decision emphasizing that appropriations measures rarely should be read to modify substantive legislation.[178] Appropriations are meant to be available for any authorized purpose—it is usually not possible to identify any particular purpose as having been approved by the provision of funds. Nor is such an inquiry appropriate; Congress ought not to be encouraged to change substantive policy silently through the appropriations process, thereby avoiding direct political responsibility.

Although *AFL-CIO v. Kahn* took an incorrect approach to issues of statutory interpretation, the outcome of the case is not necessarily wrong. The court correctly identified the "nexus" between pertinent statutory purposes and the President's order as a critical determinant of legality. Thus, as in *Anaconda Copper*, determinations of fact and policy remained to be reviewed. The court's approach to those issues in *AFL-CIO v. Kahn* is considered below,[179] after an exploration of procedural issues surrounding judicial review of presidential action.

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[176] 618 F.2d at 808-09 (MacKinnon, J., dissenting). See note 175 supra.

[177] 618 F.2d at 795-96. Admittedly, this was worth something; yet it was accompanied by disclaimers of any intent to affect the pending litigation over the President's authority for the program. Id.

[178] TVA v. Hill, 437 U.S. 153, 189-91 (1978).

[179] See notes 228-32 infra and accompanying text.

VI. Judicial Supervision of Executive Procedure

Analysis of the extent to which courts should supervise the process by which presidential decisions are made, or probe the process after the fact in search of the basis for a decision, is aided by consideration of a case reviewing a presidential law-applying decision that was structured by statute to an unusual degree. The Public Utilities Regulatory Policies Act of 1978 (PURPA)[180] authorized the President to select, from among several applicants, one company to build a proposed pipeline to transport crude oil from the west coast to the interior. The statute directed the Secretary of the Interior to review applications, obtain the recommendations of other agencies, and provide an opportunity for the public to comment, before forwarding the matter to the President for decision.[181] PURPA directed the President to review the information submitted to him and to decide within short, specified deadlines which, if any, of the applications to approve.[182] The President's decision was to be published in the Federal Register along with his findings on sixteen stated criteria and his reasons for selecting the particular applicant.[183] The statute authorized expedited judicial review of the President's decision through an action of unspecified nature in federal district court.[184]

In January 1980, Secretary of the Interior Andrus published a notice in the Federal Register, reporting that the President had accepted Interior's recommendation that Northern Tier Pipeline Company be selected and that he had adopted the Department's 200-page report of findings on the sixteen statutory criteria.[185] The notice then provided a concise explanation of the President's reasons for the decision.

Affected environmental groups, local governments, and Indian

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[180] 43 U.S.C. §§ 2001-2012 (Supp. III 1979).

[181] Id. § 2005.

[182] Id. § 2007. This provision directed the President to review "all" the information submitted to him, "including environmental impact statements, comments, reports, recommendations, and other information." Taken literally, such a command would have left the President time to do little else. The courts traditionally have held that administrators facing massive records need review them only through appropriate summaries. E.g., National Nutritional Foods Ass'n v. FDA, 491 F.2d 1141, 1146 (2d Cir.) (Friendly, J.), cert. denied, 419 U.S. 874 (1974). It is most unlikely that courts would require more of the President.

[183] 43 U.S.C. § 2007(b)-(c) (Supp. III 1979).

[184] Id. § 2011.

[185] 45 Fed. Reg. 6480 (1980).

tribes soon filed petitions to set aside the decision. In *No Oilport! v. Carter*,[186] the court ruled on motions for summary judgment by both plaintiffs and defendants. The court began by noting that the Government had earlier moved to limit review to the administrative record, which it had defined as documents compiled in the Interior Department and "the documents which form part of and reflect the President's decision,"[187] principally the Report to the President and the Federal Register notice of his decision. The court had denied the motion in order to allow proof attacking the sufficiency of the Government's environmental impact statement, but not to allow discovery against the President. The court now permitted the Government to file an affidavit by Stuart Eizenstat, the President's Assistant for Domestic Affairs and Policy, which responded to allegations that the President had not actually made the statutory decision himself. The affidavit said that the President personally had considered the statutory criteria, decided to adopt Interior's findings, and instructed Eizenstat to ask Secretary Andrus to publish the decision in the Federal Register.[188] The court accepted the affidavit as sufficient to refute the plaintiffs' contention, and regarded the publication of the President's decision through the Secretary as satisfactory. Furthermore, the court held the substance of the President's decision to be unreviewable because two of the statutory criteria called for analysis of the effects of the decision on national security and foreign relations.[189] The court then granted the Government's motion for summary judgment on all matters relating to the President's decision.[190]

In *No Oilport*, the court was confronted with evidence of procedural sloppiness in the White House. The statute appeared to con-

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[186] 520 F. Supp. 334 (W.D. Wash. 1981).

[187] Defendant's Memorandum on Limitation of Review to the Administrative Record of the Department of the Interior Recommendation and Review Process and the Documents Which Were Part of the Presidential Decision, *No Oilport* (copy on file with the Virginia Law Review Association).

[188] The Eizenstat affidavit also stated that the summary of the decision published in the Federal Register was accurate, 520 F. Supp. at 348-49. The court admitted the affidavit under a doctrine allowing supplementation of the administrative record for "evidence to fully explicate the decision-maker's course of conduct or grounds of decision," id. at 347 (citing Asarco, Inc. v. EPA, 616 F.2d 1153, 1159-60 (9th Cir. 1980)).

[189] Id. at 352. The court cited Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103 (1948), and Braniff Airways, Inc. v. CAB, 581 F.2d 846 (D.C. Cir. 1978). See generally 43 U.S.C. § 2007(b)(1)(I), (N) (Supp. III 1979).

[190] 520 F. Supp. at 373.

template that the President would publish his own decision, rather than have someone else summarize his rationale.[191] The accuracy of the account published here was questionable because it was made after the fact by another official. Indeed, a finding pursuant to one of the statutory criteria was omitted altogether.[192] Nevertheless, the court was correct to allow the Government to fill the gaps with the Eizenstat affidavit, although some lingering doubts remain. Clearly it would have been better for the President to have signed a document prepared for publication in the Federal Register that directly stated his findings and reasons. In any case, his subordinates would prepare the explanatory materials; the difference is one of degree in assuring the President's responsibility for the decision in all its particulars.

The conclusion that the *No Oilport* court was correct to regard the procedural deficiencies before it as harmless error assumes that the courts have the means both to check the procedures actually employed in a particular case and to provide sufficient incentives for procedural regularity. Judicial review of presidential action must respect separation of powers limits on intrusion into the internal deliberations of the Executive Branch. In *United States v. Nixon,*[193] the Supreme Court recognized a qualified constitutional executive privilege for discussion between the President and his principal advisers, based on the need to foster candid policy discussion by protecting the confidentiality of executive deliberations. To set the limits of the privilege, the Court established a process of weighing the needs of the executive against those of the judiciary on a case-by-case basis.[194] The Court concluded that the district court had acted properly by treating material that had been sub-

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[191] 43 U.S.C. § 2007(c) (Supp. III 1979).

[192] The omission concerned a separate FTC report not contained in Interior's report to the President. The Eizenstat affidavit said that the President had relied on the FTC report for the necessary finding. The court regarded the omission to publish it as harmless error. 520 F. Supp. at 350.

[193] 418 U.S. 683 (1974). Because executive privilege does not rest on a textual basis in the Constitution, it is a modern example of an "inherent" presidential power, although not one of a substantive nature.

[194] In *Nixon,* the President's "broad, undifferentiated" claim of privilege, one not based on a specific claim of need to protect "military, diplomatic, or sensitive national security interests," was outweighed by a specific need for production of relevant information in a criminal proceeding. The Court reserved questions concerning the appropriate balance between the interest in deliberative confidentiality and the need for relevant evidence in civil litigation. Id. at 712 n.19.

poenaed by the Watergate Special Prosecutor as presumptively privileged until the Prosecutor made a sufficient showing of need for it. On that basis, the Court upheld the district court's order that the material be transmitted to it for in camera inspection.

The *Nixon* Court made clear that when the President makes a specific claim that secret material is involved, in camera inspection should not always occur. It reaffirmed the approach of *United States v. Reynolds,*[195] which had involved a claimant's demand for evidence in a Tort Claims Act suit against the Government. In *Reynolds,* the Court recognized an absolute privilege for state secrets, but authorized courts presented with a claim of privilege to satisfy themselves that it was legitimate.[196]

Courts should approach executive privilege claims in a manner parallel to the well-developed practice under the Freedom of Information Act (FOIA).[197] FOIA, in a provision closely modeled on executive privilege,[198] exempts from disclosure agency deliberative materials.[199] Under FOIA, policy debate that precedes an agency decision need not be disclosed, but factual data and any policy materials actually adopted by the agency as the rationale for its decision must be revealed.[200] An agency claiming exemption from FOIA ordinarily prepares and releases an index specifying the documents withheld and the reasons for withholding them; the documents themselves are not usually reviewed in camera.[201]

Plaintiffs challenging presidential actions should not ordinarily be able to discover pre-decisional materials; such disclosures would invade the core of the constitutional privilege recognized in *Nixon.*

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[195] 345 U.S. 1 (1953).

[196] Nevertheless, *Reynolds* forbade in camera review where it appeared, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged." Id. at 10.

[197] 5 U.S.C. § 552 (1976). FOIA does not apply to the President and his immediate advisers. See note 93 supra.

[198] See generally NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975).

[199] 5 U.S.C. § 552(b)(5) (1976) exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[200] NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975). See also Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980); Lead Indus. Ass'n v. OSHA, 610 F.2d 70 (2d Cir. 1979); Mead Data Cent., Inc. v. Department of Air Force, 566 F.2d 242 (D.C. Cir. 1977).

[201] Mead Data Cent., Inc. v. Department of Air Force, 566 F.2d 242 (D.C. Cir. 1977); Vaughn v. Rosen, 523 F.2d 1136 (D.C. Cir. 1975).

Nor should courts ordinarily allow plaintiffs to obtain depositions or testimony for the purposes of establishing the chain of events leading to a decision and identifying the rationale actually adopted.[202] Affidavits usually should suffice for those purposes; discovery would involve a quantum difference in time and disruption costs imposed on senior executive officials. Courts can use in camera procedures to the extent necessary to check the paper trail,[203] thus protecting privileged materials from disclosure while ensuring that the required criteria for decision reached the President and were considered by him. The burdens imposed by this method of inquiry should be tolerable, although they are not insignificant. The prospect that this inquiry will occur should provide compensating practical incentives for procedural regularity in the White House, because the inquiry usually would not occur when the President makes explicit findings on statutory criteria for decision.[204]

In some contexts, courts have found it difficult to identify any meaningful role at all for judicial review of presidential action. A leading case is *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*,[205] where the Supreme Court examined the provi-

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[202] Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 794 n.33 (E.D.N.Y. 1978), aff'd, 614 F.2d 1290 (2d Cir. 1979) (citing Peoples v. USDA, 427 F.2d 561, 567 (D.C. Cir. 1970)); Wirtz v. Local 30, International Union of Operating Eng'rs, 34 F.R.D. 13, 14 (S.D.N.Y. 1963) (requiring a "clear showing" of need to prevent "prejudice or injustice" to the requesting party).

[203] Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 793-94 (E.D.N.Y. 1978), aff'd, 614 F.2d 1290 (2d Cir. 1979).

[204] See generally notes 245-53 infra and accompanying text.

[205] 333 U.S. 103 (1948). In an opinion by Justice Jackson, the Court concluded that foreign policy decisions are

> wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111 (citations omitted). *Waterman*'s sweeping generalities are somewhat troubling, because the Court did not pause to seek an alternative of broad but not unlimited deference. See generally Hochman, Judicial Review of Administrative Processes in Which the President Participates, 74 Harv. L. Rev. 684 (1961). The Court subsequently has endorsed a more discriminating approach, in its comprehensive discussion of the political question doctrine in Baker v. Carr, 369 U.S. 186, 211 (1962) (footnotes omitted):

> There are sweeping statements to the effect that all questions touching foreign rela-

sion of the Civil Aeronautics Act[206] calling for presidential review of foreign air route certifications by the Civil Aeronautics Board (CAB), and found the President's action to be unreviewable as a political question because of the large role of confidential information in foreign policy decisions. Without altering the substantive categories of presidential decisions that the courts traditionally have found to be unreviewable, it is possible to employ a process of judicial review that will cull out the reviewable issues, and will even provide some check on executive responsibility with respect to the unreviewable ones. The way such a process could operate is suggested by *Braniff Airways, Inc. v. CAB*,[207] which, citing *Waterman*, held a CAB order awarding an international air route to be unreviewable. The court rejected an argument that review could occur because President Ford's letter approving the route award contained a statement that "[t]he issues presented in this proceeding are not affected by any substantial defense or foreign policy considerations, and no defense or foreign policy considerations underlie my decision."[208] Although the court recognized that the President's statement was an attempt to provide an opportunity for judicial review of the decision,[209] it disapproved of what it regarded as a presidential effort to assume the court's role of deciding which CAB orders should be subject to judicial review.[210] Moreover, the court doubted whether unreviewable considerations were ever truly absent from international air route decisions.

Whenever unreviewable factors may be present, courts should

> tions are political questions. . . . Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action.

[206] 49 U.S.C. §§ 1301-1542 (1976).

[207] 581 F.2d 846 (D.C. Cir. 1978).

[208] Id. at 848.

[209] The statement had issued pursuant to procedures specified in Exec. Order No. 11,920, 3 C.F.R. 121 (1976), which required agency reports to the White House to "identify with particularity the defense or foreign policy implications" of a CAB decision under review, and which contemplated presidential disclaimers of the kind issued by President Ford. Id. at 122.

[210] The court was influenced in reaching this result by indications that the President did not feel bound to certify in all cases whether defense or foreign policy concerns were present. 581 F.2d at 851-52.

require the Government to submit a certification stating whether such factors entered into the decision (without stating specifically what the factors were, of course). Courts should be willing to exercise judicial review in cases where the President states that unreviewable factors are not part of the decision. Contrary to the *Braniff* court's assertion, this would not grant the President a discretionary power to decide whether judicial review is appropriate. The President would be accountable for his certification; on the authority of *Reynolds*,[211] a reviewing court could probe it far enough through in camera procedures to detect the presence of unreviewable factors without intruding deep into executive confidences. Where the President did not rely on unreviewable factors, the court could seek a legal basis for the decision without special concern for the reliability of the inquiry, although the *Braniff* court surely is correct that some unreviewable factors would be present in some instances when the President would choose not to rely on them. Certain extralegal considerations can enter into any statutory decision, without the opportunity or the responsibility for courts to prevent their presence. Judicial review of administrative action centers on a search for a legal basis according to criteria made relevant by statute, and upholds a decision if the necessary basis is present, absent special indications that other reasons played a central role.[212]

In *No Oilport*, the court held President Carter's selection of an applicant to build the crude oil pipeline to be substantively unreviewable because the statute called for findings concerning the national security and foreign policy consequences of the selection.[213] The court clearly should not have evaluated the substantive sufficiency of these aspects of the decision—that was a matter between the President and Congress. The court did not consider, however, whether it could or should review the other fourteen required findings. The other findings were quite unrelated to the unreviewable ones; they included such criteria as the proposed system's environmental impacts, the feasibility of financing it, and the safety and

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[211] See notes 195-96 supra and accompanying text.

[212] See note 79 supra and accompanying text.

[213] See notes 189-90 supra and accompanying text. The President's decision stated that the route selected had national security advantages because it was entirely within the United States, and briefly reviewed Canada's expression of preference for one or another of the Canadian routes. 45 Fed. Reg. 6480, 6481 (1980).

efficiency of its design.[214] Assuming that Congress meant each of its criteria to be met, the court could have reviewed all but the two findings that were beyond its competence. To do so would have given maximum scope to the statute's explicit provision for judicial review of the President's action.[215]

As *No Oilport* illustrates, even when the substance of a presidential decision is unreviewable, a court can review for compliance with procedures prescribed by statute.[216] In such cases, as in *No Oilport,* the focus of the court's attention is likely to be on whether the President himself considered the mandated criteria for decision. By assuring itself that he did, the court can help to enforce the President's accountability to Congress and the public for the decision.

A final problem falling under the rubric of procedural review is the applicability to presidential decisions of an emerging body of law that considers whether and to what extent courts should attempt to control "ex parte" contacts between an agency engaged in rulemaking and interested persons—including White House officials—that occur outside the public process for compiling the administrative record on which the agency will base the final rule.[217] This emerging body of law is not directly applicable to presidential decisions because they are not usually required to be based on a record compiled by public procedures.[218] Moreover, executive privilege protects policy debate in the White House from public disclosure; it would sharply curtail the privilege to require contacts between White House officials and outsiders to be made public. Indeed, such a rule could increase White House insularity by deterring free consultation. Nor is it necessary to impose such a rule: the source of a policy view that persuades the President is unimportant if he is willing to take responsibility for it.[219] Therefore, an

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[214] 43 U.S.C. § 2007(b)(A), (E), (K) (Supp. III 1979).

[215] Id. § 2011.

[216] See also Sneaker Circus, Inc. v. Carter, 566 F.2d 396, 402 (2d Cir. 1977).

[217] See generally, e.g., Verkuil, Jawboning Administrative Agencies: Ex Parte Contacts by the White House, 80 Colum. L. Rev. 943 (1980).

[218] An appropriate exception is the procedural treatment of international air route awards, which are conducted as adjudications at the agency level and are reviewed, on narrow grounds, by the President. 49 U.S.C. § 1461 (1976 & Supp. III 1979). Ex parte contacts with White House staff while the President's decision is pending are forbidden by executive order. See generally Bruff, supra note 26, at 502 n.251.

[219] If new factual material emerges during White House debate, it should be added to the

explanation requirement for presidential action can provide a sufficient guarantee of decisional fairness without imposing the burdens of special procedural requirements.[220]

In general, the courts should not reach out for procedural formalities as a primary control on presidential discretion. The potential for burdening the Presidency through the cumulative imposition of procedural requirements is too great.[221] The exception for explanation requirements is justified by their central role in assuring legality, which is explored in the discussion that follows.

VII. Establishing a Rational Basis for Presidential Action

Under the APA, courts reviewing informal agency decisions ordinarily require the Government to establish the rationality of the decision on the basis of the administrative record.[222] The issue here is the suitability of this mode of review for presidential decisions. It might be argued that courts should eschew any attempt to probe the basis of presidential decisions—that they should uphold any presidential action for which they can imagine a rational basis, whether or not it actually existed and was relied on by the President. Such an approach would be analogous to the process by which federal courts review the rationality of most legislation.[223] The argument would be that the President, as the head of a coordinate branch of government, is entitled to the same degree of deference as Congress receives for its actions. In particular, because the President's law-making activities can be as readily analogized to legislation as to administrative rulemaking, perhaps they should be reviewed as legislation would be.

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administrative record; it is not protected by executive privilege. See note 200 supra and accompanying text.

[220] The courts may be moving toward this position even for agency rulemaking that is based on a public record. See Sierra Club v. Costle, 15 Env't Rep. Cas. (BNA) 2137, 2213-25 (D.C. Cir. 1981).

[221] See, e.g., Alaska v. Carter, 462 F. Supp. 1155 (D. Alaska 1978) (discussed at note 156 supra), in which the court was properly reluctant to find a requirement for White House preparation of environmental impact statements. In contrast, in Independent Gasoline Marketers Council v. Duncan, 492 F. Supp. 614 (D.D.C. 1980) (discussed at notes 233-44 infra and accompanying text), the court was prepared to require the President to follow notice and comment procedures for a law-making decision, on the basis of a rather ambiguous statutory requirement.

[222] See notes 75-80 supra and accompanying text.

[223] See generally, e.g., G. Robinson, E. Gellhorn & H. Bruff, supra note 64, at 619-24.

Such an approach would be unsuited to review of presidential action. First, a primary reason for judicial willingness to suppose a rational basis for legislation is that, unlike execution, legislative action need not be taken to promote specific, prescribed aims.[224] It is sufficient for legislation to serve as a rational means to *any* legitimate end;[225] execution, on the other hand, must serve as a rational means to the *particular* ends sought by the statute. Unless the courts ensure that executive action rationally serves statutory ends, they will allow the erosion of Congress's constitutional power to direct the course of execution.[226]

Nevertheless, some may argue that when Congress delegates power directly to the President, it impliedly intends that judicial review be especially deferential. Indeed, this article has concluded that courts should not employ either the delegation doctrine or statutory interpretation in a fashion that will artificially constrain congressional grants of broad discretion to the President. Yet for this very reason, a meaningful constraint must exist somewhere, in order to enforce whatever limits Congress does set. Otherwise, if the President could take any action that is compatible on its face with a statutory purpose, the practical consequence would be the adoption of Theodore Roosevelt's expansive theory that the President may take any action not forbidden by law. In view of the facial breadth of most statutory delegations of power to the President, this approach either would foster an undue concentration of power in the executive or would impel Congress to shackle execution by imposing more conditions in advance than it might deem wise.[227] Moreover, a method of judicial review that examined only

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[224] Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 225, 229 (1976). Professor Mashaw has argued recently that although legislation need not promote any particular goals, it should be subject to requirements that some public, not private, purpose be advanced. Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849 (1980).

[225] Even for legislation, courts occasionally have modified the traditional test for rationality by requiring a showing that a legislative classification actually serves some legitimate end. Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972). This effort only attempts to minimize the potential for legislation that serves a forbidden end, however; it does not hold the legislature to any particular permissible ends.

[226] This particular separation of powers concern is not present, of course, when courts review statutes for constitutionality.

[227] Alternatively, Congress could be forced to delegate power to agency officials when it wished judicial review to be an important check. See National Treasury Employees Union v.

the facial validity of presidential actions would encourage Presidents to issue opaque decisions, deterring the present practice of explaining some (if not all) presidential actions.

In defining judicial review of the substance of presidential decisions, courts should begin with the traditional "rational basis" requirement of nonstatutory review. Two recent cases reveal the need to isolate the issue of substantive review and to deal with it carefully. First, in *AFL-CIO v. Kahn*,[228] the court stated an appropriate standard for reviewing the basis of a presidential action—that it be "reasonably related" to statutory policies[229]—but it was lax in evaluating whether the Government had demonstrated the required nexus adequately. In response to an argument that the President's order would impair rather than foster realization of the FPASA's economy and efficiency goals because under it the lowest bidder would not always win the contract, the court said:

> we find no basis for rejecting the President's conclusion that any higher costs incurred in those transactions will be more than offset by the advantages gained in negotiated contracts and in those cases where the lowest bidder is in compliance with the voluntary standards and his bid is lower than it would have been in the absence of standards.[230]

The court cited a conclusory affidavit from the acting head of the Office of Federal Procurement Policy in the record and optimistic administration testimony in Congress to support this conclusion.

By deferring to vague and unsupported conclusions in litigation affidavits, the court vitiated the effectiveness of the standard of review it had articulated, because the connection between oblique statutory policies and the likely effects of a presidential program is critical to whether a court should find implied authority. Although litigation affidavits are a permissible way to identify a missing rationale for a decision, courts should not use them to establish that the rationale has the necessary basis in fact and policy.[231] For that

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Nixon, 492 F.2d 587, 613 (D.C. Cir. 1974).

[228] See notes 174-78 supra and accompanying text.

[229] 618 F.2d at 793 n.49 (quoting Mourning v. Family Publications Serv., 411 U.S. 356, 371 (1973) (reviewing the conformity of an administrative regulation to statutory purposes)).

[230] Id. at 793.

[231] In Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419 (1971), the

purpose, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court."[232]

Another recent case demonstrates similar problems in substantive review of presidential action. The Trade Expansion Act (TEA)[233] authorizes the President to restrict imports that "threaten to impair the national security," by imposing quotas or fees.[234] A finding by the Secretary of the Treasury that an imported article threatens the national security is a procedural prerequisite to presidential action. In March 1979, the Secretary reported to President Carter that petroleum imports were threatening the national security because of increased reliance on foreign suppliers and the effects of payment outflows on the national economy.[235] Over a year later, President Carter accepted the Secretary's invitation to take action and issued a proclamation creating a program designed to produce a ten cent per gallon increase in the retail price of gasoline.[236]

The President's proclamation explained that the high level of the nation's consumption of gasoline was the "single most important cause of our dependence on foreign oil," and the easiest to reduce without dislocations in the economy. Accordingly, he had decided to adjust imports by imposing a fee under the TEA and passing the cost of this fee through to the price of gasoline by a system of "entitlements" payments under either the TEA or the Emergency Petroleum Allocation Act of 1973 (EPAA),[237] a statute authorizing the President to impose price and allocation controls on petroleum products.

In *Independent Gasoline Marketers Council v. Duncan*,[238] industry plaintiffs succeeded in enjoining the President's program.

Court rejected affidavits prepared for litigation as a basis for substantive review, calling them "merely '*post hoc*' rationalizations . . . which have traditionally been found to be an inadequate basis for review."

[232] Camp v. Pitts, 411 U.S. 138, 142 (1973).

[233] 19 U.S.C. § 1862(b) (1976).

[234] Id. See FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (discussed at notes 104-07 & 124-25 supra and accompanying text).

[235] 44 Fed. Reg. 18,818 (1979).

[236] Proclamation No. 4744, 45 Fed. Reg. 22,864, amended by Proclamation No. 4748, 45 Fed. Reg. 25,371 and Proclamation No. 4751, 45 Fed. Reg. 27,905 (1980).

[237] 15 U.S.C. §§ 751-760 (1976).

[238] 492 F. Supp. 614 (D.D.C. 1980).

The court first considered whether the TEA sufficed to authorize the program. It noted that although the Supreme Court had upheld import fees under the TEA, it had cautioned that its decision did not mean that "*any* action the President might take, as long as it has even a remote impact on imports, is also so authorized."[239] Here, the court concluded, the effects of the program on imports would be "far too remote and indirect for the TEA alone to support the program."[240]

The court's opinion, however, did not articulate the standard of review it was applying to factual judgments about the likely effect of the program on imports, which the court correctly regarded as vital to the legality of the program under the TEA. Because the year-old Treasury report had recommended no particular action, it did not provide support for the intended effects of the President's program. To fill the gap in the record, the Government filed an affidavit by Secretary of Energy Duncan, which argued that the program would "maximize the conservation effect and the reduction of imports" resulting from the initial fee on imported oil.[241] Secretary Duncan appended a copy of a brief memorandum he and Treasury Secretary Miller had sent the President formally recommending adoption of the program on grounds that it would reduce gasoline consumption, "thereby reducing the level of oil imports."[242] The court cited neither document and, in the end, appar-

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[239] Id. at 618 (quoting *Algonquin SNG*, 426 U.S. at 571) (emphasis in original).

[240] 492 F. Supp. at 618. The court held that the EPAA could not help supply the necessary authority for the President's action because the President had failed to comply with its procedural requirements. The EPAA contained a remarkably awkward provision applying portions of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note (1976), to "any action taken by the President (or his delegate) . . . as if . . . such action had been taken under the Economic Stabilization Act," 15 U.S.C. § 754(a)(1) (1976). In turn, the 1970 Act by its terms was subject to the APA's notice and comment procedures for rulemaking. 12 U.S.C. § 1904 note (1976) (citing 5 U.S.C. § 553 (1976)). The White House had not employed such procedures in promulgating the President's program. The Government, noting that Congress had added the provisions requiring rulemaking procedure to the Economic Stabilization Act after the President had delegated its administration to a subordinate agency, argued that the legislation had not clearly intended to impose procedural constraints on the President himself, and, in light of separation of powers concerns, the court should not decide that they had so intended. The court brushed these contentions aside with a rather literal approach that emphasized the EPAA's reference to actions taken by the President.

[241] Affidavit of Charles W. Duncan, Jr., *Independent Gasoline Marketers Council*, at 4 (copy on file with the Virginia Law Review Association).

[242] Id. (Tab A).

ently simply disagreed with the President's judgment.

Finally, the court found that the President's action contravened a statute forbidding the imposition of fees on gasoline as part of contingency plans for conservation in case of supply disruptions.[243] The court viewed the President's program as "an attempt to circumvent" this restriction on his authority "in the guise of an import control measure."[244]

The court's analysis was flawed. It should first have decided whether the President's action would have been legal if it had produced the effects claimed for it, or whether it exceeded his statutory authority on its face. If the court were prepared to conclude that the President's program was in conflict with the statutory limitation on his authority to include fees on gasoline in contingency plans, it should have rested its holding squarely on that provision. The resulting precedent would have had minimal effect on the President's import authority under the TEA. Instead, the court confused its determination of the extent of the President's statutory authority with its review of the factual basis for his action in a fashion that led to creation of an unnecessarily narrow statutory precedent. The court should have relied on the Government's affidavits for the purpose of elaborating the President's rationale that a fee applied to retail sales of all gasoline would reduce imports, and it should have deferred to that judgment if the Government could have supported the order's rationality on the administrative record.

As these two cases demonstrate, the rational basis standard is not self-defining. This characteristic, however, may be an advantage in that the courts can adapt its application to the nature of each presidential decision under review. As an "undefined defining term,"[245] the standard can provide the needed flexibility, yet always within the limitation that the judges may not substitute their

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[243] Energy Policy and Conservation Act, 42 U.S.C. §§ 6201-6422 (Supp. III 1979).

[244] 492 F. Supp. at 618. The Government subsequently appealed; Congress responded with legislation, passed over the President's veto, specifically repealing the program. 126 Cong. Rec. S6376-87 (daily ed. June 6, 1980); 126 Cong. Rec. H4600-02 (daily ed. June 5, 1980).

[245] The phrase is Justice Frankfurter's, written in the context of interpreting the APA's "substantial evidence" standard for judicial review of agency adjudications. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

judgment for that of the President.[246] Here it is only possible to articulate some factors for the courts to consider in defining their role. On the one hand, review should be relatively deferential when the President's independent constitutional powers are present in the case, or when the substantive judgments involved approach nonreviewability.[247] In *No Oilport,* for example, the presence of some unreviewable factors in the decision should have induced the court to review the other grounds for decision with a degree of deference that recognized the dangers of analyzing fragments of a larger decision. On the other hand, review should be relatively close when the President's action nears the substantive constitutional[248] or statutory limits on his power, as in *AFL-CIO v. Kahn,* which presented a serious possibility that the President had transgressed statutory limits. Substantive review can also be performed with relative confidence to the extent that decisions are based on fact and policy judgments that are similar to those found routinely in administrative law, as in *Anaconda Copper.* Of course, in a particular case there may be considerations pulling in both directions,[249] as in *Independent Gasoline Marketers Council,* where considerations of international scope had some bearing on the decision, but where statutory limitations were also relevant.

The administrative record against which a court should compare a President's decision usually is generated principally in one or more executive agencies; White House materials are likely to be mostly policy memoranda that are protected by executive privilege. Therefore, a central task for the courts is to see that appropriate links exist between a record developed in one place and a decision reached in another.[250] Performed correctly, judicial review can help

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[246] See note 72 supra and accompanying text.

[247] *Meat Cutters* is an example of a case involving a statutory decision based on very broad policy judgments. See note 125 supra.

[248] E.g., Cole v. Young, 351 U.S. 536 (1956) (discussed at note 127 supra).

[249] E.g., Haig v. Agee, 101 S. Ct. 2766 (1981) (discussed at note 127 supra).

[250] In addition to *AFL-CIO v. Kahn* and *Independent Gasoline Marketers Council,* two other cases discussed above illustrate the importance of this inquiry. In *No Oilport,* see notes 180-92 & 213-16 supra and accompanying text, a 200-page agency report was the basis of a presidential decision formally adopting its findings. Only the Federal Register explanation of the decision provided any assurance that the President's rationale was a reasoned response to the report. In *Anaconda Copper,* see notes 154-64 supra and accompanying text, the court, expressing relief that it did not "find it necessary to determine the standard of judicial review which shall apply in many factual determinations by the President," 14 Env't Rep. Cas. (BNA) at 1855, never reached issues concerning the factual basis for the

to ensure bureaucratic regularity, with particular tasks being performed at appropriate levels in the bureaucracy. The primary effect on executive branch decisionmaking should be to force the White House to consult with agencies having relevant program responsibilities, and with counsel. The agencies may already possess an administrative record pertinent to an upcoming decision; at any rate, they—not the White House—are the appropriate place to compile one. The function of compiling and reviewing an administrative record within an agency is to discover, and explain to the ultimate policymakers, the limits of defensible discretion. Similarly, the role of the President's counsel is to render opinions on the permissibility of postulated policy choices, given certain fact assumptions and the terms and legislative history of the relevant statute.

If legal review of a proposed decision reveals that certain factual judgments or policy rationales must underlie a decision if it is to be legal, these matters ought to accompany the proposal all the way to the President's desk. The effect, however, should never be to increase the work load of the President himself. All that need reach the President is an indication in the options memorandum (or in oral discussion) that a particular decision would require certain fact and policy underpinnings, a summary of those conclusions, and a statement that the appropriate officials believe them to be adequately supported. The President's selection of a particular option will then also select the basis for it that will be advanced on judicial review. As a matter of mechanics, the White House staff can structure presidential decision memoranda to separate the policy analysis from an attached formal document that is prepared for signature and release to the public.

Judicial requirements for the identification of a legally sufficient rationale for presidential action cannot guarantee that no ulterior purposes for it exist. The same is true, however, for judicial review of administrative action pursuant to the APA, in which formal findings and reasons may not be penetrated absent special circumstances. If no formal explanation accompanies a presidential deci-

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President's proclamations. Had the court reached these issues, it would have encountered administrative records of widely varying comprehensiveness for the different monuments—some might have proved insufficient to support the monument designations or the boundaries chosen. See note 162 supra.

sion, a court can require affidavits describing the rationale and can check their veracity through in camera procedures.[251]

Because orderly bureaucratic procedure takes time, any legal prerequisites to presidential decision must allow for response to emergencies. There are times when the President needs to exercise his statutory powers on very short notice.[252] The bureaucracy supporting the White House has encountered emergency conditions frequently enough, however, that an informal structure exists that can deal with most of them. For any of the statutes empowering the President to act, there is a repository of ready information in the form of career bureaucrats with a knowledge of the statute's terms and legislative history, and the principal cases interpreting it. Similarly, the agencies can supply necessary factual information on a rapid basis. The resulting product may be somewhat rough when a deadline is immediate, but the basic legal judgments are surprisingly reliable, if the frequency with which they survive judicial review is any guide. In cases of true exigency created by national or world events (rather than by the scheduling whim of a presidential adviser), it is likely that the substantive judgments involved are unreviewable due to the presence of foreigu policy or national defense considerations. At the least, in such a situation the President's action is likely to draw support from both his independent constitutional powers and statutes that grant him emergency powers. Such statutes typically receive broad construction by the courts.[253]

Judicial review of the President's proferred rationale for a decision under a rational basis standard offers special institutional advantages for the courts. It allows them to exercise a role that is appropriately limited, because to require identification of the basis of a decision does not prevent deferential review of the judgments involved. Especially when statutes delegate power without meaningful standards, a wide range of fact and policy bases of decision may be available. Moreover, this mode of review would free the courts to accord the President the latitude his office deserves on

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[251] See notes 195-204 supra and accompanying text.

[252] A vivid example is President Carter's action to freeze Iranian assets in the United States, which occurred on a few hours' notice. Exec. Order No. 12,170, 44 Fed. Reg. 65,729 (1979).

[253] See, e.g., United States v. Yoshida Int'l, Inc., 526 F.2d 560 (C.C.P.A. 1975).

the other issues in the case, such as statutory interpretation.[254] Thus, the doctrine that courts should defer to reasonable administrative interpretations of statutes is in part a function of explanation requirements.

In recent years, courts reviewing administrative action have employed explanation requirements as a substitute for the delegation doctrine.[255] This development implicitly recognizes that an officer's accountability to Congress and the public is ensured if he or she must demonstrate that a statutory decision is based on judgments of fact and policy that are rational and within statutory parameters. If, for example, announcement of a rationale that is politically unpalatable is a legally necessary precondition to a particular option, another option may be selected. Moreover, from the standpoint of the President's political accountability to Congress and the public, a requirement that he reveal his rationale for a decision clearly is preferable to a system that would allow him to select an option without explanation, leaving all concerned to speculate on the reasons for it. Thus, if the courts exercise their review function in a way that makes the President take responsibility for an action by stating a legally sufficient rationale for it, they will have done all they can to clarify the respective responsibilities of the two policymaking branches of government. Congressional oversight of the President's decision will be easier to exercise; if Congress chooses not to intervene with legislation that alters the President's authority, the executive practice in question will gather legitimacy from the precedent.

Explanation requirements can also increase the efficacy of executive branch checks on presidential action. The President bears a constitutional responsibility to ensure the legality of his actions, which is discharged by the ordinary processes of bureaucratic review that precede his decisions.[256] Thus, the bureaucracy consti-

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[254] Compare G. Robinson, E. Gellhorn & H. Bruff, supra note 64, at 125 (speculating that in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), the Court might not have subjected the Secretary of Transportation to a closely confining statutory interpretation if he had explained his decision).

[255] See Leventhal, Book Review, 44 U. Chi. L. Rev. 260, 263 (1976). A related emphasis on the value of explanation requirements in protecting against government arbitrariness has appeared in analysis of the constitutional requirements of procedural due process for government action. See, e.g., Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 U. Chi. L. Rev. 60 (1976).

[256] This responsibility explains in part the nature of the judicial role—by checking rather

tutes an important check on both the policy and legal bases of presidential action.[257] Although administrative officials ordinarily are prepared to judge both the facts and the law in a fashion that is sympathetic to known presidential desires, there are limits to what they will approve. If the responsible agency officials and lawyers are consulted in advance of a presidential decision, they can urge caution or advance alternatives without having to threaten to refuse their assent to a proposed decision until it is necessary to do so. After the fact, the situation changes radically—especially for the President's lawyers, who are left with the unappetizing question of whether they should refuse to defend in court an action they would not have approved in advance. Of course, bureaucratic checks on presidential action are by no means an unalloyed benefit. An agency that is not in sympathy with a presidential initiative can attempt to confine him by narrowing his policy or legal options in ways that the White House is hard pressed to identify.[258] For the courts, however, it is enough to accord the President the kinds of deference on law and policy that are described above, in order to give full play to his policymaking role.

An explanation requirement for presidential decisions would not be without its costs. In enforcing such a requirement, courts would have to be prepared to set aside and remand some presidential actions because the White House failed to establish a sufficient basis in fact and relevant policy, even though such a basis could have been established through more orderly bureaucratic procedures. That is, however, the ordinary price of requiring reasoned administrative decisionmaking.[259] As applied to the President, it would have the compensating advantage of ensuring his political accountability for the rationale finally adopted. Nevertheless, the potential for some rather formalistic remands clearly is present. In addition, in all cases the White House staff would be required to spend some added time and effort to ensure the presence of a legal basis for presidential decisions. The costs of the process of review outlined here seem tolerable, however. The alternative methods for ensuring

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than supplanting the executive's judgment regarding what actions are legal, the courts presuppose that such a judgment actually has been made in a particular case.

[257] See J. Choper, supra note 36, at 276-81.

[258] See notes 53-55 supra and accompanying text.

[259] See, e.g., SEC v. Chenery Corp., 318 U.S. 80 (1943); Linde, supra note 224, at 230.

the legality of presidential action either threaten to impose undue constraints—e.g., the delegation doctrine—or fail to meet the need to conform the President's decisions to law.