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# THE SUPERSECRETARY IN CHIEF

KATHRYN E. KOVACS\*

*The President often makes binding decisions using authority that statutes delegate to another federal officer. I dub the President in this capacity the Supersecretary in Chief. Presidents Obama and Trump, for example, dictated environmental and immigration policies even though federal statutes assign such decisions to other officers. The unitary executive theory accepts this practice on the premise that the Constitution vests all executive power in the President. Hence, the President may act in place of any officer in the executive branch. When acting as Supersecretary in Chief, however, the President does not engage the procedures that statutes require of statutorily designated officers and does not face the same scope of judicial review. Therefore, the President acting as Supersecretary in Chief inappropriately shifts the balance of powers between the three branches of government. The President should not be permitted to act as Supersecretary in Chief. In the absence of action to rein in the Supersecretary in Chief, the Administrative Procedure Act presents a second-best alternative. Applying the Act to the Supersecretary in Chief would partially restore the balance of powers and advance the Act's normative goals.*

## INTRODUCTION

The U.S. President plays many roles. Under the Constitution, the President acts as Commander in Chief when directing the military,<sup>1</sup> “Legislator in Chief” when exercising the President’s functions in the

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\* Professor, Rutgers Law School, The State University of New Jersey. Thanks to Jack Beermann, Kristin Hickman, Harold Krent, Gillian Metzger, Richard Murphy, Linda Meyer, David Noll, Charlotte Schneider, Bijal Shah, Peter Shane, Matthew Shapiro, Kevin Stack, Chris Walker, and participants at the Administrative Law New Scholarship Roundtable at the University of Wisconsin. © Kathryn E. Kovacs (2020).

1. U.S. CONST. art. II, § 2, cl. 1. See generally Zachary Price, *Congress’s Power Over Military Offices*, 99 TEX. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3550548](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3550548) [<https://perma.cc/JRD7-Q2C2>] (exploring the scope of congressional and presidential authority over military officers).

legislative process,<sup>2</sup> and Negotiator in Chief under the Treaty Clause.<sup>3</sup> The President acts as the “Statutory President” when exercising authority delegated to the Office of the President by statute,<sup>4</sup> for example, when controlling immigration, establishing tariffs, and declaring emergencies.<sup>5</sup> As head of the executive branch, the President often acts as “Administrator in Chief,” guiding the federal officers who are charged by statute with implementing the law.<sup>6</sup>

This essay concerns situations in which the President goes beyond guiding those officers and actually exercises their statutory authority, essentially acting as a higher-level officer. I dub the President in this capacity the Supersecretary in Chief.<sup>7</sup> President Trump, for example, decided to “permit [liquefied natural gas] to be transported in approved rail tank cars,”<sup>8</sup> even though a federal statute delegates that safety determination to the Secretary of Transportation.<sup>9</sup> Similarly, both Presidents Obama and Trump dictated immigration enforcement policies, even though a federal statute assigns enforcement discretion to the Secretary of Homeland Security.<sup>10</sup> As Kathryn Watts observed, “presidential control . . . has become woven into the fabric of the regulatory state, and it occurs regardless of the political party in the White House.”<sup>11</sup>

The unitary executive theory blesses this state of affairs as an accurate reflection of Article II. The Constitution vests the executive power in the President, the argument goes; therefore, all exercises of executive power are

2. See Vasan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 WM. & MARY L. REV. 1, 4 (2002).

3. U.S. CONST. art. II, § 2, cl. 2.

4. Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 542 (2005).

5. See Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 62 (2020).

6. See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 358–59 (2017). Others use the term “Administrator in Chief” to refer to the President “as a central figure directing agencies’ implementation of statutes.” Bijal Shah, *Congress’s Agency Coordination*, 103 MINN. L. REV. 1961, 1963 n.5 (2019) (citing references). I use the term here to refer to the President as the administrative head of the executive branch, as distinguished from the President as the decisionmaker or Supersecretary in Chief.

7. See *Super*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/super> [<https://perma.cc/Y7TN-VE83>] (defining the prefix “super” as “situated or placed above, on, or at the top of”).

8. Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15497 § 4(b) (Apr. 10, 2019) (“The Secretary of Transportation shall propose for notice and comment a rule . . . that would . . . permit LNG to be transported in approved rail tank cars. The Secretary shall finalize such rulemaking no later than 13 months after the date of this order.”).

9. 49 U.S.C. § 60102.

10. See *infra* text accompanying notes 33–35.

11. Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683, 726 (2016).

within the President's purview.<sup>12</sup> Accordingly, the Constitution gives the President the inherent power not only to influence the actions of the officials to whom Congress has assigned statutory authority, but also to step into their shoes and direct their actions, nullify their actions, or take action in their stead, even in areas in which the President otherwise has no constitutional power.<sup>13</sup>

Focusing on the Supersecretary in Chief demonstrates that the unitary executive theory is wrong, because allowing the President to exercise functions that Congress assigned to another officer shifts the balance of powers between the three branches of government.<sup>14</sup> First, the legitimacy of congressional delegations of power to federal officers is premised on control of those officers. Yet, unlike other federal officers, the President is not subject to such control. Second, Congress delegates authority to agencies on the understanding that the agencies will implement their statutory authority via Administrative Procedure Act ("APA") processes and face judicial review.<sup>15</sup> Under the Supreme Court's decision in *Franklin v. Massachusetts*, however, the President does not follow the APA and is not subject to full judicial review.<sup>16</sup> Third, the President's duty to execute the law faithfully requires the President to implement Congress's choices regarding the scope of the statutory delegation, the required procedure, and the identity of the delegate. The Supersecretary in Chief does not do so. Given those significant constitutional costs, the unitary executive theory's approval of the Supersecretary in Chief casts serious doubt on the theory. It should be abandoned, and the President should not be permitted to act as Supersecretary in Chief.

Unfortunately, neither Congress nor the courts have reined in the Supersecretary in Chief, which leads me to explore alternative approaches to correcting the current imbalance. One possible alternative is the APA.

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12. Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 562 (2018); see also *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President' . . ." (quoting U.S. CONST. art. II, §1, cl. 1)).

13. See Stack, *supra* note 4, at 583 (canvassing proponents of a strong unitary executive theory); see also Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 593–99 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242–43 (1994); Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 607 (2005).

14. See *infra* Part II.

15. Administrative Procedure Act, Pub. L. No. 79–404, 60 Stat. 237 (1946).

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

Treating the Supersecretary in Chief like an “agency” under the APA would restore some balance by subjecting the President to Congress’s and the courts’ control, reinstating Congress’s primacy in drafting statutes, and faithfully executing the law—at least to some extent.<sup>17</sup> Unfortunately, the APA cannot solve the balance-of-powers problem entirely because it does not erase the fact that the President as Supersecretary in Chief supplants Congress’s chosen delegate. At most, the APA is a second-best alternative to simply striking down any presidential effort to bypass statutory delegations.

### I. THE PRESIDENT AS SUPERSECRETARY IN CHIEF

Congress often enacts statutes delegating decisionmaking responsibility to federal officers who lead administrative agencies in the executive branch. There is little dispute that the President, as head of the executive branch, may “be involved in agency decisions such as rulemaking.”<sup>18</sup> Beyond that, however, there is much debate. Under the standard view, the President cannot go so far as to “dictate actions to officials that Congress has authorized to act.”<sup>19</sup> If a presidentially appointed official takes action with which the President disagrees, the President’s primary legal recourse is to remove that person from office.<sup>20</sup>

The unitary executive theory contradicts the standard view. It posits that the Constitution assigns the executive power—“all of it,” as the Court

17. See *infra* Part III.

18. Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1131 (2010).

19. Mark Seidenfeld, *A Process-Based Approach to Presidential Exit*, 67 DUKE L.J. 1775, 1781 (2018); see also Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 539 (1989) (“[T]he President may not simply render a decision himself when Congress has vested such authority in another officer.”); William W. Buzbee, *The Tethered President: Consistency and Contingency in Administrative Law*, 98 B.U. L. REV. 1357, 1363 (2018) (“[P]olicy shifts cannot be carried out by executive fiat.”); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 965 (2001) (the “conventional wisdom is that the President does not have” “the power to dictate the substance of regulatory decisions that agencies are required by law to make”); Robert V. Percival, *Who’s in Charge? Does the President Have Directive Authority over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2538 (2011) (“the view most accepted by scholars is that the President does not” have “the legal authority to dictate the substance of regulatory decisions entrusted by statute to agency heads”); Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 705–06 (2007).

20. Bruff, *supra* note 19, at 539; Richard J. Pierce, Jr., *Saving the Unitary Executive Theory from Those Who Would Distort and Abuse It: A Review of The Unitary Executive by Steven G. Calabresi and Christopher S. Yoo*, 12 U. PA. J. CONST. L. 593, 613 (2010) (“I do not believe that the President has the power to veto a decision made by an executive officer to whom Congress has delegated the decision. If the President disagrees with such a decision his only recourse is to remove the officer.”).

recently emphasized<sup>21</sup>—to the President alone.<sup>22</sup> Any officer the President appoints merely helps the President exercise that constitutional authority.<sup>23</sup> Thus, the President is not limited to merely influencing the officials to whom Congress has delegated statutory authority. Rather, the Constitution gives the President the implied power to dictate their decisions or step into their shoes to exercise their authority, even in areas in which the President has no constitutional power.<sup>24</sup> In other words, the President may act as a higher level officer—as a Supersecretary.

Despite years of cautionary scholarship,<sup>25</sup> the unitary executive theory is now a reality.<sup>26</sup> As Daniel Farber observed, “recent presidents of both parties ‘have publicly proclaimed their authority to direct the administration of the federal government,’ with George W. Bush famously calling himself ‘the decider’ and Barack Obama saying, ‘I’ve got a pen to take executive actions where Congress won’t.’”<sup>27</sup> Presidents now direct agency actions via executive order, memorandum, and even tweet.<sup>28</sup> They do this not only in

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21. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020).

22. Kovacs, *supra* note 12, at 562.

23. Calabresi & Prakash, *supra* note 13, at 596 (“[T]he Constitution establishes that the President exclusively controls the power to execute all federal laws, and therefore it must be the case that all inferior executive officers act in his stead.”) (emphasis omitted); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991–94 (1993) (similar); PETER M. SHANE, MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 34, 37, 145 (2009) (explaining the unitary executive theory).

24. See Stack, *supra* note 4, at 583 (canvassing proponents of a strong unitary executive theory); see also Calabresi & Prakash, *supra* note 13, at 593–99; Calabresi & Rhodes, *supra* note 13, at 1166; Lawson, *supra* note 13, at 1242–43; Yoo et al., *supra* note 13, at 607.

25. See, e.g., Buzbee, *supra* note 19; Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397 (2013); Strauss, *supra* note 19.

26. See Kovacs, *supra* note 12, at 562; Jerry L. Mashaw & David Berke, *Presidential Administration in A Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. 549, 551 (2018) (studying the growth of presidential control in the Obama and Trump administrations); Watts, *supra* note 11, at 729 (“Presidential directive authority with respect to executive agencies is alive and well.”); Christopher S. Yoo, *Foreword*, 12 U. PA. J. CONST. L. 241, 243 (2010) (“The consistency with which the last several administrations have embraced centralized control over the administration of federal law eloquently demonstrates how the unitary executive has gained general acceptance.”); cf. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 75 (2017) (“[P]residential administration has become the central reality of the contemporary national government.”).

27. Daniel A. Farber, *Presidential Administration Under Trump* 23 (Aug. 9, 2017) (unpublished manuscript) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015591](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015591) [<https://perma.cc/SD5X-RM-HM>]; see also Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 274–75 (2010) (detailing President Obama’s “principal strategies to strengthen his control over the executive”).

28. See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 571 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d Cir. 2019) (quoting stipulation that President Trump uses

the military and national security arena where the President's power is primary, but in areas in which Congress has constitutional primacy and has assigned policymaking authority to a particular officer.<sup>29</sup> Presidents are overriding Congress's chosen delegate to act as the Supersecretary in Chief.

For example, President Obama took credit in a YouTube video for the Clean Power Plan,<sup>30</sup> a rule that the Clean Air Act authorized the Administrator of the Environmental Protection Agency ("EPA") to issue.<sup>31</sup> President Trump mandated its rescission in an executive order.<sup>32</sup>

The Immigration and Nationality Act delegates enforcement discretion to the Secretary of Homeland Security.<sup>33</sup> Nonetheless, President Obama announced a new immigration enforcement policy in the Rose Garden; the Secretary of Homeland Security then promulgated it in a memorandum.<sup>34</sup> Five days after his inauguration, President Trump issued an executive order directing his new Secretary to rescind that policy and prescribing new enforcement priorities for the Department.<sup>35</sup>

President Trump has provided numerous other examples of this phenomenon.<sup>36</sup> He:

- ordered the Army Corps of Engineers to "approve in an

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Twitter "to announce, describe, and defend his policies . . . [and] to announce official decisions"); J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1739–41 (2018). See generally PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2d ed. 2014).

29. See Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1745, 1762, 1766–69 (2019).

30. The Obama White House, *President Obama on America's Clean Power Plan*, YOUTUBE (Aug. 2, 2015), <https://www.youtube.com/watch?v=uYXyYFzP4Lc> [<https://perma.cc/5EAD-BNF3>]. See generally Jud Mathews, *Presidential Administration in the Obama Era*, in THE U.S. SUPREME COURT AND CONTEMPORARY CONSTITUTIONAL LAW: THE OBAMA ERA AND ITS LEGACY 67 (Anna-Bettina Kaiser, Niels Petersen & Johannes Saurer eds., 2019) (discussing presidentialism in the Obama administration).

31. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (promulgated under 42 U.S.C. § 7411(d), which delegates rulemaking authority to the EPA Administrator).

32. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

33. 8 U.S.C. § 1103(a).

34. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot. et al. (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/U5RD-6XLA>]; see also Manheim & Watts, *supra* note 29, at 1787 ("[T]he DAPA order in some ways felt like an executive order.").

35. Exec. Order No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

36. Manheim & Watts, *supra* note 29, at 1786 ("Trump has acted aggressively throughout his presidency to blur the lines between the President and the agencies he oversees.").

expedited manner” the Dakota Access Pipeline,<sup>37</sup> even though the relevant statutes delegate decisionmaking authority to the Secretaries of the Army and Interior<sup>38</sup>;

- ordered the EPA “to take specific actions to ensure efficient and cost-effective implementation” of the Clean Air Act<sup>39</sup> and to revise its Clean Water Act regulations to minimize the ability of states and tribes to interfere with the approval of energy projects,<sup>40</sup> despite the fact that both of those statutes empower the Administrator of the EPA to make such decisions<sup>41</sup>;
- ordered the Secretaries of the Interior, Agriculture, and Commerce to renew expired rights-of-way for energy infrastructure,<sup>42</sup> although the relevant statutes assign that responsibility to those particular officers<sup>43</sup>;
- ordered the Secretaries of Agriculture and the Interior to pursue active forest management,<sup>44</sup> overriding the statutes that entrust such judgments to those officers<sup>45</sup>;
- ordered the Secretaries of Treasury, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, and Education to amend their regulations to require recipients of public assistance to seek employment,<sup>46</sup> although typically the relevant statutes assign rulemaking responsibility to the Secretaries<sup>47</sup>;

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37. Construction of the Dakota Access Pipeline, Memorandum for the Secretary of the Army, 82 Fed. Reg. 11,129 (Jan. 24, 2017); *see also* Buzbee, *supra* note 19, at 1389.

38. The President referenced the Mineral Leasing Act, which delegates authority to the Secretary of the Interior, 30 U.S.C. § 185(a), and the Clean Water Act and the Rivers and Harbors Act, which delegate authority to the Secretary of the Army, 33 U.S.C. §§ 408, 1344.

39. *Presidential Memorandum for the Administrator of the Environmental Protection Agency* (Apr. 12, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-administrator-environmental-protection-agency> [<https://perma.cc/57E6-8TU9>].

40. Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15,495 § 3 (Apr. 10, 2019).

41. 42 U.S.C. § 7410; 33 U.S.C. § 1341.

42. Exec. Order No. 13,868, 84 Fed. Reg. 15,495, 15,497 § 6(b) (Apr. 10, 2019).

43. *See* U.S. DEP'T OF ENERGY, QUADRENNIAL ENERGY REVIEW: ENERGY TRANSMISSION, STORAGE, AND DISTRIBUTION INFRASTRUCTURE ch. IX (Apr. 2015), [https://www.energy.gov/sites/prod/files/2015/04/f22/QUER-ALL%20FINAL\\_0.pdf](https://www.energy.gov/sites/prod/files/2015/04/f22/QUER-ALL%20FINAL_0.pdf) [<https://perma.cc/Q6RK-F9QK>].

44. Exec. Order No. 13,855, 84 Fed. Reg. 45 (Dec. 21, 2018). Many of these presidential orders include boilerplate statements that they should be “implemented consistent with applicable law and subject to the availability of appropriations.” *E.g.*, *id* § 7(b); Exec. Order No. 13,868 § 10(b). That language does not prevent Presidents from ordering officers to take specific actions.

45. *E.g.*, 16 U.S.C. § 529; 43 U.S.C. §§ 1701, 1732.

46. Exec. Order 13,828, 83 Fed. Reg. 15,941, 15,943 § 3 (Apr. 10, 2018).

47. *E.g.*, 7 U.S.C. § 2015(b)(4) (Supplemental Nutrition Assistance Program); 42 U.S.C. § 607

- ordered the Secretary of Labor to revise the regulations governing multiple employer retirement plans,<sup>48</sup> even though Congress delegated that authority to the Secretary<sup>49</sup>; and
- ordered agencies to revise their regulations governing commercial use of space<sup>50</sup> and established a detailed policy on the management of traffic in space<sup>51</sup> although statutes already assigned those responsibilities to the National Aeronautic and Space Administration and the Secretary of Transportation, among others.<sup>52</sup>

Numerous other statutes order federal officers to implement their provisions in regulations. Yet, President Trump issued an executive order forcing those officers to repeal two regulations for every one promulgated,<sup>53</sup> thus “constraining the authority of regulatory agencies to implement those statutes consistent with their express purposes and goals.”<sup>54</sup> Trump’s handling of the COVID-19 pandemic provides numerous other examples of this phenomenon.<sup>55</sup>

Even where a President does not go so far as to dictate a particular regulatory outcome, the President’s influence may be so strong that the agency effectively is prevented from exercising its statutorily delegated discretion. For example, President Trump issued an executive order regarding the rule interpreting the term “waters of the United States” in the Clean Water Act.<sup>56</sup> He ordered the Army Corps of Engineers and the EPA to rescind or revise the existing rule and consider making the new rule “consistent with the opinion of Justice Antonin Scalia in *Rapanos v. United*

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(b)(3)(A) (Temporary Assistance for Needy Families).

48. Exec. Order 13,847, 83 Fed. Reg. 45,321 (Aug. 31, 2018).

49. 29 U.S.C. § 1135.

50. Streamlining Regulations on Commercial Use of Space, Space Policy Directive-2, 83 Fed. Reg., 24,901 (May 24, 2018).

51. Space Policy Directive-3, National Space Traffic Management Policy, 83 Fed. Reg. 28,969 (June 18, 2018).

52. *E.g.*, 51 U.S.C. §§ 20113(a), 50905(b)(2).

53. Exec. Order No. 13,771, 82 Fed. Reg. 9,339 (Jan. 30, 2017); *see also* Buzbee, *supra* note 19, at 1376–77 (“[T]he President directed all agencies to make deregulatory policy shifts, but without regard to the net benefits, legislative edicts, and societal conditions that led to the earlier regulatory actions.”).

54. Joel A. Mintz, *The President’s “Two for One” Executive Order and the Interpretation Mandate of the National Environmental Policy Act: A Legal Constraint on Presidential Power*, 87 UMKC L. REV. 681, 693 (2019).

55. *E.g.*, Exec. Order No. 13,948, 85 Fed. Reg. 59,649 (Sept. 23, 2020) (ordering the Secretary of Health and Human Services to adjust prescription drug prices under Medicare).

56. Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017).

*States*, 547 U.S. 715 (2006).<sup>57</sup> Technically, the President left the decision to the Army Secretary and EPA Administrator, but his order “tilt[ed] the agencies” toward Scalia’s view.<sup>58</sup> Following the President’s wishes in such an order must be a major motivation for any final agency decision.<sup>59</sup> Indeed, the agencies’ notice of intent to revise the rule specifically referenced the President’s “directive” as its motivation,<sup>60</sup> and the final rule followed Justice Scalia’s *Rapanos* opinion.<sup>61</sup> Even without a direct order, the President displaced Congress’s chosen delegate.

In sum, where before agencies would make policy decisions with more or less presidential influence, Presidents now make policy decisions with more or less agency involvement.<sup>62</sup>

One difficulty with this state of affairs is that Presidents do not follow the procedures required of agencies, and they are not subject to judicial review to same extent as agencies.<sup>63</sup> Before issuing any binding policy statement, an agency must give notice of its proposal, accept and consider public comments, and publish the final rule with an explanation for its decision.<sup>64</sup> The President need not follow any particular procedure before issuing a binding directive.<sup>65</sup> If an agency’s decision is challenged in court, it must produce an administrative record for the court to use when

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57. *Id.* § 3, *see also* Buzbee, *supra* note 19, at 1383; Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013).

58. Buzbee, *supra* note 19, at 1383.

59. Seidenfeld, *supra* note 25, at 1453 (arguing that if the President makes their view known before the agency has deliberated, the agency is likely to be biased towards the President’s desired outcome). Manheim and Watts divide presidential orders into those that are “legally binding” (that is those “that carry the force and effect of law”) and those that are not legally binding (that is those that “do not themselves alter legal rights or obligations”). Manheim & Watts, *supra* note 29, at 1764–65. Orders that regulate private parties directly fall into the former category. *Id.* That distinction, however, is difficult to draw and not effective, because everything the President does is “binding” in some sense. Indeed, Manheim and Watts recognize that their categories “blur together around the margins,” and non-binding orders have a significant effect, “even if the effect is largely political instead of legal.” *Id.* at 1766.

60. Intention to Review and Rescind or Revise the Clean Water Rule, 82 Fed. Reg. 12,532, 12,532 (Mar. 6, 2017); *see also* Buzbee, *supra* note 19, at 1383.

61. *See* Jeremy P. Jacobs and Pamela King, *Trump’s Rewrite Is Finalized. What Happens Now?*, E & E NEWS (Apr. 21, 2020), <https://www.eenews.net/stories/1062934329> [<https://perma.cc/7T6Y-9MU>]; Amena H. Saiyid, *Lawyers See Maui Opinion as Grounds to Challenge Trump Water Rule*, BLOOMBERG LAW (Apr. 27, 2020, 7:37 AM) <https://news.bloomberglaw.com/environment-and-energy/lawyers-see-maui-opinion-as-grounds-to-challenge-trump-water-rule> [<https://perma.cc/5V7E-59C4>].

62. The APA sometimes uses the term “agency” to refer to the officer who heads the agency. *See, e.g.*, 5 U.S.C. § 557(b); *see also* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759, 766 (1981) (referring to 5 U.S.C. § 554(d)(C)).

63. Kovacs, *supra* note 5, at 65.

64. 5 U.S.C. § 553.

65. Manheim & Watts, *supra* note 29, at 1759; Stack, *supra* note 4, at 552, 554–55.

determining whether the action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>66</sup> Presidential decisions cannot be reviewed under that standard,<sup>67</sup> and presidential documents generally are not included in administrative records.<sup>68</sup>

Despite the inadequate procedure and judicial review, presidential policy decisions are all binding to some degree.<sup>69</sup> A presidential order, like an agency rule, can have the force of law even if it binds only an executive branch agency<sup>70</sup> and even if it is not enforceable in court.<sup>71</sup> The Department of Justice now takes the position that even the President’s Tweets are official statements of the President.<sup>72</sup> Both agencies<sup>73</sup> and courts have treated them

66. 5 U.S.C. § 706(2)(A); Kovacs, *supra* note 12, at 550.

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

68. Kovacs, *supra* note 5, at 103. Plaintiffs, of course, may wait for the agency to implement the President’s directive and sue the agency. *See* Franklin, 505 U.S. at 828 (Scalia, J., concurring in part and concurring in the judgment). That approach, however, is inadequate. The agency must follow the President’s instructions; its lack of discretion makes its action unreviewable. *Cf.* Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752 (2004) (holding that where a presidential order deprives an agency of discretion, the agency need not analyze the environmental effects of its action). Moreover, the agency cannot explain the President’s reasoning, but can only supply a *post hoc* rationale for an already-final decision. Kovacs, *supra* note 5, at 112.

69. *See* Ruhl & Salzman, *supra* note 28, at 1741; Elizabeth Landers, *White House: Trump’s Tweets Are ‘Official Statements,’* CNN (June 6, 2017, 4:37 PM), <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html> [<https://perma.cc/DXM6-X9GC>]; *Executive Power—Presidential Directives—In Tweets, President Purports to Ban Transgender Servicemembers*, 131 HARV. L. REV. 934, 937–38 (2018) (“[T]he basic principles governing presidential instruments...tell us that authoritative presidential directives, whatever their form, are legally binding on subordinates.”).

70. *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (stating that a rule is legislative if it “binds private parties or the agency itself with the ‘force of law’”); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 222 (2006) (“[A] decision has the ‘force of law’ if the agency is legally bound by it.” (citing *FEC v. Nat’l Rifle Ass’n*, 254 F.3d 173, 185–86 (D.C. Cir. 2001))); *cf.* *Elec. Privacy Info. Ctr. v. Internal Revenue Serv.*, 910 F.3d 1232, 1244 (D.C. Cir. 2018) (“[A]n agency can create a non-discretionary duty by binding itself through a regulation carrying the force of law.”).

71. Stack, *supra* note 4, at 597 (“[J]udicial enforceability is not necessary to the existence of a norm having the status of law.”).

72. *See, e.g.* Memorandum of Law in Support of Motion for Summary Judgment at 15, Knight First Amendment Inst. at Columbia Univ. v. Donald J. Trump, No. 1:17-cv-05205-NRB (S.D.N.Y. Oct. 13, 2017), <https://static.reuters.com/resources/media/editorial/20171016/knightvtrump--DOJSJmotion.pdf> [<https://perma.cc/K84L-MF83>]; Defendant’s Supplemental Submission & Further Response to Plaintiff’s Post-Briefing Notices at 2, 4, James Madison Project v. Dep’t of Justice, No. 1:17-cv-00144-APM (D.D.C. Nov. 13, 2017), <https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdf> [<https://perma.cc/3K6Y-D84W>].

73. *See* Adam Aton, *Trump Tweet Becomes Policy After Firefighters Rebuffed It*, E&E NEWS (Aug. 9, 2018), <https://www.eenews.net/stories/1060093713> [<https://perma.cc/T2K6-6BWC>]; *U.S. Secretary of Commerce Wilbur Ross Issues Directive for National Marine Fisheries Service to Facilitate Water Access in California Wildfire Relief Efforts*, U.S. DEP’T OF COM. (Aug. 8, 2018), <https://www.commerce.gov/news/press-releases/2018/08/us-secretary-commerce-wilbur-ross-issues-directive-national-marine> [<https://perma.cc/93TD-Y3CH>]; *cf.* Shawn Snow & Leo Shane III, *Trump Says Tweet Serves as*

as binding.<sup>74</sup>

## II. UNBALANCING THE BALANCE OF POWERS

Allowing the President to exercise authority that a statute assigns to another officer impermissibly shifts the balance of power between the branches of government. The unitary executive theory blesses this state of affairs. As explained above,<sup>75</sup> the unitary executive theory holds that “[w]henever an official is granted statutory discretion, the Constitution endows the President with the authority to control that discretion.”<sup>76</sup> Others have explained some of the flaws in that theory.<sup>77</sup> Focusing on the Supersecretary in Chief reveals flaws that the existing critiques have not highlighted. The unitary executive theory’s endorsement of the Supersecretary in Chief, despite the significant constitutional problems with the President bypassing Congress’s chosen delegate, further demonstrates that unitary executive theory is wrong.

The balance-of-powers concept “stresses the need to balance the departments of government, primarily through the creation and maintenance of tension and competition among them.”<sup>78</sup> As James Madison observed in *Federalist No. 51*, each part of the government must be given “the necessary constitutional means and personal motives to resist encroachments of the

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*‘Notification’ to Congress that US May ‘Quickly & Fully Strike Back’ Against Iran*, MILITARY TIMES (Jan. 5, 2020), <https://www.militarytimes.com/flashpoints/2020/01/05/trump-says-tweet-serves-as-notification-to-congress-that-us-may-quickly-fully-strike-back-against-iran/> [<https://perma.cc/N43M-T2EG>]. *But see* Matthew Chou, *Agency Interpretations of Executive Orders*, 71 ADMIN. L. REV. 555, 582 (2019) (“[T]he military declined to act on President Trump’s July 26, 2017 tweets that purported to exclude transgender individuals from the military, until the President issued a presidential memorandum.”).

74. *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) (citing a tweet when noting that “the President recently confirmed his assessment that it is the ‘countries’ that are inherently dangerous, rather than the 180 million individual nationals of those countries who are barred from entry under the President’s ‘travel ban’”) (citing Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 6:20 PM), <https://twitter.com/realDonaldTrump/status/871899511525961728>), *judgment vacated*, 138 S. Ct. 377 (2017) (mem.), *vacated*, 874 F.3d 1112 (9th Cir. 2017).

75. *See supra* text accompanying notes 22–24.

76. Prakash, *supra* note 23, at 992.

77. *See, e.g.,* SHANE, *supra* note 23; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346 (1994); Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741 (2009); Percival, *Presidential Management*, *supra* note 19; Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596 (1989); Jed Handelsman Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)* (Fordham Law Legal Studies Research Paper No. 3596566, June 23, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3596566](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596566) [<https://perma.cc/6URZ-S46L>].

78. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1130 (2000); *see also id.* at 1131, 1159.

others.”<sup>79</sup> M. Elizabeth Magill correctly highlighted the indeterminacy of this concept.<sup>80</sup> At its core, though, the balance-of-powers concept rejects any effort to usurp one branch’s constitutional checks on the others<sup>81</sup> and views with skepticism efforts to reduce the level of tension and competition between the branches.<sup>82</sup>

The President acting as Supersecretary in Chief violates that concept in at least three interrelated ways. First, the legitimacy of statutory delegations of decisionmaking authority to agencies is premised on control of those agencies.<sup>83</sup> The APA codified the conditions for that legitimacy. As I explained elsewhere, “[t]he APA represents a constitutional moment following years of meaningful democratic deliberation. At that moment, Congress, the President, and the courts unanimously accepted the existence of the administrative state, conditioned on procedural constraints and judicial review.”<sup>84</sup> The APA’s requirements “were the necessary ‘quid pro quos’ for the creation of the administrative state.”<sup>85</sup>

The President, however, is not subject to such control, because *Franklin v. Massachusetts* held that the APA does not apply to the President.<sup>86</sup> Consequently, the President may take action using solely statutory authority without any procedural restraint or adequate judicial review.<sup>87</sup> This undermines Congress’s and the courts’ ability to control the exercise of statutory delegations, shifting the balance of power decidedly in the

79. THE FEDERALIST NO. 51, at 289–90 (James Madison) (Clinton Rossiter ed., 1999).

80. Magill, *supra* note 78, at 1194–97.

81. *Id.* at 1175.

82. See *id.* at 1196; see also Michael J. Teter, *Congressional Gridlock’s Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1135 (“[N]o matter the approach one chooses to follow, the core elements of separation of powers remain: separated branches performing certain functions while serving as checks on the others as a means of preserving the proper balance of power.”). But see Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive “Underenforcement,”* 164 U. PA. L. REV. 1677, 1682 (2016) (suggesting that the balance of powers “metaphor is not useful”).

83. See Watts, *supra* note 11, at 724–25 (“[W]e justify the existence and the legitimacy of what would otherwise be a ‘headless fourth branch’ by the fact that the political branches can and do exert control over agency heads.”); cf. Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 108 COLUM. L. REV. SIDEBAR 1 (2008) (“The Court therefore sees its role as attempting to reconcile the needs of both political branches for control of agency policy. It establishes the conditions for conflict and compromise between the political branches to produce politically reasonable policy outcomes. These conditions are inherent in separation of powers.”).

84. Kovacs, *supra* note 5, at 89.

85. Michael Ray Harris, *Standing in the Way of Judicial Review: Assertion of the Deliberative Process Privilege in APA Cases*, 53 ST. LOUIS U. L.J. 349, 380–81 (2009).

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

87. See Kovacs, *supra* note 5, at 78.

President's favor. "When the President assumes policymaking power without policymaking constraints, it undermines the central bargain of the APA and shakes the foundation upon which the administrative state is built."<sup>88</sup>

Second, Congress delegates authority to officers on the understanding that the officers will implement their statutory authority via APA procedures and face judicial review.<sup>89</sup> Attorney General Wirt observed in 1823 that "[t]he Constitution assigns to Congress the power of designating the duties of particular officers."<sup>90</sup> The Constitution also assigns to Congress the power of specifying the procedures by which officers act.<sup>91</sup> In fact, even where statutes assign rulemaking authority to the Office of the President, Congress may subject that authority to "substantive or procedural constraints."<sup>92</sup> In other words, Congress may constrain presidential "value judgments in order to effectuate the execution of the law it creates."<sup>93</sup> Allowing the President to exercise statutory authority without satisfying Congress's statutory conditions contradicts Congress's intent and undermines the legislative bargains underlying the statutory delegations, effectively usurping Congress's lawmaking power.<sup>94</sup> It "cloth[es] the President with a power entirely to control the legislation of Congress"<sup>95</sup> and is "inconsistent with a fundamental design principle reflected in our evolved constitutional order."<sup>96</sup>

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88. *Id.* at 90. Manheim and Watts pointed out that "separation-of-powers principles" cut "in the direction of *protecting* the president" and "in the direction of *checking* the president." Manheim & Watts, *supra* note 29, at 1810 (emphasis in original). That is particularly so because recent decades have "seen a massive transfer of policymaking authority from the legislative branch to the executive branch, coupled with increasingly aggressive attempts by Presidents to control that policymaking." *Id.*

89. *See* Strauss, *supra* note 19, at 754 (observing that when Congress delegates rulemaking authority, it intends for that authority to "be exercised at some remove from raw politics, pursuant to the APA and subject to FOIA").

90. The President & Accounting Offices, 1 Op. Att'y Gen. 624, 625–26 (1823).

91. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 318 (2006) ("[S]tatutory constructions that imply directive powers disrupt Congress's interest in specifying the procedures through which statutory delegations should be implemented.").

92. VALERIE C. BRANNON, CONG. RESEARCH SERV., LSB10172, CAN A PRESIDENT AMEND REGULATIONS BY EXECUTIVE ORDER? 2 (2018); *see also* Seidenfeld, *supra* note 19, at 1786 ("[I]f Congress can withhold the power from the president entirely, it seems logical that Congress should be able to condition the exercise of that power however it sees fit.").

93. Seidenfeld, *supra* note 19, at 1787.

94. *See* Harold J. Krent, *From a Unitary to a Unilateral Presidency*, 88 B.U. L. REV. 523, 550–51 (2008); *see also* Christopher J. Walker, *Restoring Congress's Role in the Modern Administrative State*, 116 MICH. L. REV. 1101, 1115 (2018) (emphasizing Congress's lawmaking power as a means of retaining balance of powers).

95. *Kendall v. United States ex rel. Stokes*, 37 U.S. 524, 613 (1838).

96. Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1980 (2015); *see also* Krent, *supra* note 94, at 550–51, 558; *cf.* Percival, *Presidential Management*, *supra* note 19, at 1005 (arguing that it undermines the value of the Senate's

Proponents of the unitary executive theory might object that Congress also delegates with the understanding that the President has the power to control federal officers, and thus, all statutory delegations to federal officers include the potential for a presidential override.<sup>97</sup> On the contrary, members of Congress may not agree with unitary executive theory.<sup>98</sup> They may recognize that “the Vesting Clause only speaks to the issue of *who* has control of this executive power to implement the laws. It does not speak to *what* the laws require in terms of substance or *how* to implement them in terms of process.”<sup>99</sup> They may understand that the President’s executive power must coexist with Congress’s power “to make all laws necessary and proper” for executing the powers vested in the federal government “or in any Department or Officer thereof.”<sup>100</sup> They may believe that Congress plays a “central role in structuring the Executive Branch,” and “[t]he President, as to the construction of his own branch of government, can only try to work his will through the legislative process.”<sup>101</sup> Robert Percival showed that “every regulatory review program since the rise of the administrative state has been founded on the notion that the president did not have the authority to displace agency decisionmaking.”<sup>102</sup> As Percival pointed out, some statutes expressly allow the President to override agency decisions, which undermines any inference that Congress intends to allow the President to override agencies in other circumstances.<sup>103</sup>

Third, the President’s duty to execute the law faithfully requires the President to implement the choices Congress and the President jointly etched in statutes.<sup>104</sup> Like a fiduciary, the President “must diligently and steadily

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advice and consent if the President can override an officer’s decision in any event).

97. See *Morrison v. Olson*, 487 U.S. 654, 709 (1988) (Scalia, J., dissenting) (asserting that all “of the purely executive powers of government must be within the full control of the President”).

98. Even if the Constitution requires all executive power to be lodged in the President, “a constitutional requirement of course does not imply that the legislation complies with it.” Stack, *supra* note 91, at 274.

99. Richard W. Murphy, *The DIY Unitary Executive*, 63 ARIZ. L. REV. (forthcoming 2020) (manuscript at 35) (on file with author).

100. U.S. CONST. art. I, § 8, cl. 18; see also *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2226 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (stating that Congress has the power “to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties”).

101. *Seila Law LLC*, 140 S. Ct. at 2227.

102. Percival, *Presidential Management*, *supra* note 19, at 999.

103. *Id.* at 1008 (“If the president has express authority to overturn the legal consequences of agency decisions in some circumstances, but not others, the argument for inferring congressional intent to permit the president generally to displace agency decisions is somewhat weaker.”); see also Stack, *supra* note 91, at 227–228.

104. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*,

execute Congress's commands."<sup>105</sup> Thus, the President must implement Congress's choices regarding the scope of the statutory delegation, the required procedure, and the identity of the delegate.<sup>106</sup> When the President executes quintessentially presidential functions—commanding the armed forces, negotiating treaties, etc.—one might argue that legislative restrictions are inappropriate. On the other hand, when the President performs functions that Congress delegated to another officer—when the President acts as Supersecretary in Chief—legislative restrictions are part of the law that the President must execute.<sup>107</sup> Failing to do so impermissibly shifts the balance of powers toward the President.

### III. THE APA TO THE RESCUE?

In the absence of congressional or judicial action to rein in the Supersecretary in Chief, the APA provides a means of restoring some balance between the branches. I demonstrated elsewhere that the President should be subject to the APA when exercising powers assigned by statute to the Office of the President; in other words, the Statutory President should be treated like an “agency” under the APA.<sup>108</sup> I explained how the Supreme Court misread the APA's text and contradicted its history when it held to the contrary in *Franklin v. Massachusetts*.<sup>109</sup> I revealed the flaws in the Court's constitutional analysis: contrary to *Franklin*, treating the Statutory President like an “agency” under the APA alleviates the constitutional concerns with the President making binding policy decisions unilaterally.<sup>110</sup> I also presented the normative case for treating the Statutory President like any other agency under the APA.<sup>111</sup> Finally, I sketched a model for applying the APA to the Statutory President using *Trump v. Hawaii* as a foil.<sup>112</sup> I did not address the question of whether the President should be subject to the APA

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132 HARV. L. REV. 2111, 2186 (2019).

105. *Id.* at 2192.

106. Buzbee, *supra* note 19, at 1390–91; *see also* Strauss, *supra* note 19, at 711 (“The important propositions are that Congress (validly) assigned decision here and specified that decision should be taken by this official, following these procedures, within these legal constraints.”); *id.* at 759 (“Congress's arrangements of government are a part of the law that the President is to assure will ‘be faithfully executed.’”).

107. *See* Murphy, *supra* note 99 (“The executive power to implement the laws does not carry with it the power to violate them (which would, in any event, violate the president's duties under the Take Care Clause).”).

108. Kovacs, *supra* note 5.

109. *Id.* at 82–88.

110. *Id.* at 88–95.

111. *Id.* at 97–114.

112. *Id.* at 114–19.

when exercising another officer's statutory authority.<sup>113</sup> That is my task here.

If the APA applied to the Supersecretary in Chief, before making a binding decision, the President would have to give public notice of the proposed policy and accept and consider public comments.<sup>114</sup> The President would have to provide an explanation for the final decision.<sup>115</sup> Finally, the federal courts could review the record of materials the President considered in reaching a final decision<sup>116</sup> to determine if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>117</sup>

Applying these APA requirements to the Supersecretary in Chief would alleviate the balance-of-powers problems with the Supersecretary in Chief's usurpation of another officer's statutory authority. It also would advance the APA's normative goals—public participation, political accountability, transparency, deliberation, and uniformity.<sup>118</sup> It would make the President's decisionmaking more transparent to Congress and the public and subject it to court oversight, thus allowing some control and enhancing political accountability.<sup>119</sup> It also might improve the quality of the President's decisions, enhance the fairness of the President's decisionmaking process, and promote deliberation, making it more likely that the President's decisions will reflect the public interest and expertise rather than raw politics.<sup>120</sup>

Applying the APA to the Supersecretary in Chief would only partially respect Congress's lawmaking power and faithfully execute the law. The difficulty would remain that the President, when acting as Supersecretary in Chief, supplants Congress's chosen delegate. Thus, in this context, the APA

113. *Id.* at 64 n.8.

114. 5 U.S.C. § 553(b)–(c). As Manheim and Watts observed, a court may consider an order "binding" "[i]f a President or his subordinates treat a presidential order as binding—or if litigants otherwise can demonstrate that an order is binding as a practical matter." Manheim & Watts, *supra* note 29, at 1805.

115. 5 U.S.C. § 553(c) ("[T]he agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.").

116. Kovacs, *supra* note 5, at 103–04.

117. 5 U.S.C. § 706(2)(A).

118. *See* Kovacs, *supra* note 5, at 97.

119. *Id.* at 100–01.

120. *Id.* at 98–99, 104–05. Peter Shane explained how presidential usurpation of agency discretion reduces transparency and democratic dialogue and increases the risk that decisions will be "based solely on passion or 'interest'" rather than the concerns that animated the statute. SHANE, *supra* note 23, at 160, 163, 164, 183; *see also* Percival, *Presidential Management*, *supra* note 19, 1010 ("[T]here is reason to suspect that the White House would be more inclined to intervene to achieve short-term political gains than to promote the objectives of regulatory statutes Congress has entrusted agencies to administer.").

is only a second-best alternative.<sup>121</sup> If Presidents continue their march down unitary executive theory lane, though, better a second-best alternative than none.<sup>122</sup> Moreover, employing the APA to partially remedy the constitutional difficulties with the Supersecretary in Chief may be less intrusive than forcing the issue in court.<sup>123</sup>

Unfortunately, this means of restoring the balance of powers presents practical difficulties when applied to the Supersecretary in Chief. The Statutory President is designated by statute as the final decisionmaker.<sup>124</sup> Thus, the Statutory President's decisions generally appear in definitive, written documents.<sup>125</sup> In contrast, when acting as Supersecretary in Chief, the President may employ a range of devices to control officers' exercises of statutory power from expressly co-opting or directing an officer's decision to subtly nudging, massaging, facilitating, or encouraging a particular outcome.<sup>126</sup> Subjecting only the more obvious instances of presidential control to the APA could incentivize the President to shift to less obvious means of control.<sup>127</sup> That could drive presidential influence underground where Congress, the courts, and the public cannot even monitor it, much less control it.<sup>128</sup> Expanding the APA's application to all presidential influence

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121. See Lawrence Solum, *Legal Theory Lexicon: Second Best & Nonideal Theory*, LEGAL THEORY BLOG (Sept. 14, 2014, 7:38 PM), <http://lsolum.typepad.com/legaltheory/2014/09/legal-theory-lexicon-second-best-nonideal-theory.html> [https://perma.cc/69ZR-NLF8].

122. *Id.* (“[W]hen the first-best policy option is unavailable, then normative legal theorists should consider second-best solutions.”).

123. Cf. Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 485 (2010) (“[S]eeking to enforce constitutional norms through ordinary administrative law better accords with constitutional principles, and may be less intrusive on the policymaking prerogatives of the political branches, than efforts to segregate out [administrative law and constitutional common law].”); *id.* at 489 (explaining that administrative law requirements can avoid constitutional violations and enable courts to avoid addressing constitutional issues); David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. REG. 708, 749 (2020) (arguing that separation of powers claims fail to achieve their remedial goals because the APA provides a “less intrusive alternative”).

124. See Stack, *supra* note 4, at 543.

125. *Id.* at 590 (distinguishing the transparency of the Statutory President's orders from the President's influence on officers).

126. See Manheim & Watts, *supra* note 29, at 1764–65; Watts, *supra* note 11, at 688–705; see also, e.g., Juliet Eilperin & Josh Dawsey, *Trump Pushes to Allow New Logging in Alaska's Tongass National Forest*, WASH. POST (Aug. 27, 2019, 2:29 PM), [https://www.washingtonpost.com/climate-environment/trump-pushes-to-allow-new-logging-in-alaskas-tongass-national-forest/2019/08/27/b4ca78d6-c832-11e9-be05-f76ac4ec618c\\_story.html?https://perma.cc/J33C-ZSS8](https://www.washingtonpost.com/climate-environment/trump-pushes-to-allow-new-logging-in-alaskas-tongass-national-forest/2019/08/27/b4ca78d6-c832-11e9-be05-f76ac4ec618c_story.html?https://perma.cc/J33C-ZSS8).

127. Cf. Watts, *supra* note 11, at 725 (“[E]xpertise forcing threatens to drive political influences underground where such influences will be protected from public scrutiny, accountability, and oversight.”). Watts suggests compelling agencies to disclose presidential influence, but necessarily couples that with the incentive of more favorable standards of judicial review. *Id.* at 735. Absent the “carrot,” the “stick” would “drive political influences underground.” *Id.* at 725, 735.

128. Cf. *id.*; Stack, *supra* note 4, at 590 (“[W]hen the President merely urges administrators to

on agency exercises of statutory authority would require documenting all presidential contact (both direct and indirect) with decisionmaking officers, making that material available for public notice and comment, and including it all in the record for judicial review.<sup>129</sup> Such a rule would be difficult to implement and impossible to enforce; any effort in that direction could drive presidential control even further underground.

Yet, driving presidential influence underground would be better than the current trajectory toward unmasked authoritarianism. Presidential influence is constitutionally acceptable so long as it does not prevent the deciding officer from exercising their statutorily delegated discretion.<sup>130</sup> Underground influence may be less likely to cross that line. It leaves Congress's chosen delegates to make the decisions and take responsibility for them. Those officers are far more transparent and accountable than the President.<sup>131</sup> They engage the public and deliberate more than the President.<sup>132</sup> And they have the institutional support and expertise to make higher quality decisions than the President.<sup>133</sup> In any event, absent an order from the Supersecretary in Chief, the officer's decision will stand or fall on its own merits under the APA's arbitrary or capricious standard of review.<sup>134</sup> That is preferable to the overly deferential review of presidential orders.<sup>135</sup>

### CONCLUSION

Unitary executive theory endorses a shift in the balance of powers away from the courts and Congress and towards the President.<sup>136</sup> Opposition to that shift should be bipartisan.<sup>137</sup> Conservatives decried President Obama's unilateral actions, and now progressives bemoan President Trump's.<sup>138</sup> The

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pursue a course of action . . . transparency is lacking.”).

129. Watts does not go so far as to suggest this. Watts, *supra* note 11, at 735 (suggesting that agencies should be required “to disclose the substance of *significant* executive supervision” (emphasis added)); *see also id.* at 743.

130. Underground influence does not eliminate agency control, undermine the legislative bargains underlying statutory delegations, or fail to execute the law faithfully. *See supra* Part II.

131. *See Metzger, supra* note 123, at 491, 492, 530.

132. *See Kovacs, supra* note 5, at 98–99, 104–05.

133. *Id.* at 104–05.

134. 5 U.S.C. § 706(2)(A).

135. *See Kovacs, supra* note 5, at 78–82, 109–111.

136. For scholarly opposition to that theory, *see supra* note 77.

137. *Cf. Kovacs, supra* note 12, at 561–65 (analyzing the problems with unilateral presidential action).

138. *Cf. Yoo, supra* note 26, at 243 (“[D]ebates over the unitary executive are not merely a matter of partisanship, as some have claimed, but rather raise fundamental issues about the proper balance of power within the federal government that transcend the politics of the moment.”).

President should not be permitted to act as Supersecretary in Chief, lest the growing power of the presidency destroy our democratic republic.

In the absence of direct opposition to the growth of presidential power, however, the APA provides a second-best alternative. Treating the Supersecretary in Chief like an “agency” under the APA would partially alleviate the constitutional problems with the President supplanting Congress’s statutory delegates. It also would enhance public participation, political accountability, transparency, deliberation, and uniformity, leading the President to make better decisions. That is in every American’s interest.