Article

Presidential Law

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INTRODUCTION

We know the basic procedural requirements applicable to agencies. When an agency issues a regulation, it must go through notice-and-comment procedures.[1] The final rule can then be subjected to judicial "hard look review."[2] When an agency formally adjudicates, it must use trial-like procedures, including providing notice, a hearing, and cross-examination of witnesses.[3] The decision can then be challenged in court to ensure it was based on "substantial evidence."[4] These procedural requirements are well-worn, well-studied, and mostly well-understood—albeit not fully developed or uncontested. They form what we conventionally call "administrative law."

But, what about the President? The President issues regulations, adjudicates whether individuals have violated applicable law, and does much more. Yet, unlike the highly reticulated and sophisticated body of law that governs how agencies conduct these tasks, we lack even a basic understanding of what procedural law, if any, binds the

1. For informal rules, the agency must first publish a proposed rule, accept public comments, and publish a final rule accompanied by a statement of "basis and purpose." 5 U.S.C. § 553; see also Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 96 (2015) ("An agency must consider and respond to significant comments received during the period for public comment.").

2. "Hard look review" requires the agency to show, inter alia, it has considered the relevant evidence and drew rational inferences from it. *See, e.g.*, Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (setting forth the standard test for arbitrary and capricious review in administrative law).

3. *See* 5 U.S.C. §§ 554, 556. Informal adjudications can be done with different forms of hearing but also typically involve notice and a hearing. *See, e.g.*, 1 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW & PRACTICE § 2:33 (3d ed. Supp. 2020) ("Generally all informal adjudications have . . . notice, some opportunity to participate and reasons.").

4. *See, e.g.*, Consol. Edison Co. v. NLRB, 305 U.S. 197, 229–30 (1938) ("Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . . Mere uncorroborated hearsay or rumor does not constitute substantial evidence.").

President. Unlike agency exercises of power, the President is not bound by the Administrative Procedure Act (APA) or the robust judicially created procedural law that has grown out of that Act.[5] So what law governs?

The perhaps surprising answer is that we do not know. For whatever reason, this question has gone largely unexplored by scholars. To the extent there is any conventional wisdom on this issue, it is that the President has essentially *no* procedural obligations in how she exercises power.[6] Indeed, we have now heard this from the top. President Trump famously stated that "I have an Article II, where I have to the right to do whatever I want as [P]resident."[7] Of course, this is not true—there are substantive limits on the President's power.[8] But neither is it true that the President can exercise power *however* she wants. There are procedural limits too. Although the President is not bound by administrative law, there is a body of procedural law that governs the President—call it *presidential law*.

As part of this body of law, this Article argues that the President has a *duty to deliberate*. Before the President can exercise substantive power delegated directly to her, the President must first satisfy a procedural hurdle: she must gather relevant information and make a considered judgment based on that information. If she does not do so, she has acted unlawfully—she has failed to comply with her procedural obligations in exercising power.

5. *See* Franklin v. Massachusetts, 505 U.S. 788, 801 (1992) ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements."). For a comprehensive argument challenging the correctness of this Supreme Court decision, see Kathryn E. Kovacs, *Constraining the Statutory President*, 98 WASH. U. L. REV. 63, 83–96 (2020).

6. *See, e.g.*, Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 552 (2005) [hereinafter Stack, *The Statutory President*] ("In contrast to legislation or agency regulation, there are almost no legally enforceable procedural requirements that the president must satisfy before issuing (or repealing) an executive order or other presidential directive."); WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 17 (2003) ("Beyond the 1937 Federal Register Act's publication requirements, presidents need not abide by any fixed requirements when developing, issuing, or circulating an executive order or proclamation.").

7. Michael Brice Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him 'The Right To Do Whatever I Want,'* WASH. POST (July 23, 2019), https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want [https://perma.cc/NCN3-PMHM].

8. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding presidential exercise of power invalid because it was not authorized by the Constitution or statute); United States v. Nixon, 418 U.S. 683 (1974) (discussing limits to executive privilege).

Identifying this duty is extremely important. Although there has been a sense that statutory delegations specifically to the President are limited to inconsequential powers, at least outside the area of foreign affairs,[9] this is not the case. The President has a vast array of powers in both the foreign and domestic sphere. Consider a few examples:

- The President is tasked with determining "by regulation" the "quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States," as well as publishing a highly consequential "national contingency plan" establishing the procedures for the federal response to oil and chemical spills, including methods to remove such hazardous materials, how to discover which facilities are releasing them, and how to remedy such spills.[10]
- The President has frozen "prices, rents, wages, and salaries" throughout the economy upon finding that doing so was needed to "stabilize the economy, reduce inflation, and minimize unemployment."[11]
- The President can impose regulations on government procurement contracts, which make up approximately ten percent of gross domestic product, so long as she determines such regulations will promote "economy and efficiency in government procurement."[12]
- The President can close or take over telecommunications stations, upon declaring a "national emergency" and "deem[ing]" such action "necessary in the interest of national security or defense."[13]
- The President can "restrict exports of energy supplies, require accelerated production of crude oil or national gas," fill

9. *See, e.g.*, Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 523 (1987) ("Direct congressional delegations of operational powers to the President are rather insignificant, at least in domestic affairs."); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 981–82 (1997) (suggesting delegations to the President are limited to foreign affairs or other areas where the President has inherent constitutional authority).

10. *See* 33 U.S.C. § 1321(b)(3)–(4) (describing presidential authority for regulating oil and hazardous substance liability); 42 U.S.C. § 9605 (describing the national contingency plan).

11. Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 17, 1971); *see also* Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799, § 202.

12. Auth. To Issue Exec. Ord. on Gov't Procurement, 19 Op. O.L.C. 90, 90 (1995); *see also* 40 U.S.C. §§ 101, 121(a).

13. 47 U.S.C. § 606(c).

or tap the Strategic Petroleum Reserve, implement energy conservation contingency plans, prohibit burning of petroleum or other fuels, or increase fuel production if she concludes there is a "severe energy supply interruption."[14]

- The President can create national monuments by publicly proclaiming the existence of "historic landmarks . . . situated on land owned or controlled by the Federal Government" and reserving parcels "confined to the smallest area compatible with the proper care and management of the objects to be protected."[15]
- The President can ban the entry of certain classes of aliens from entering the United States so long as she determines their entry would be "detrimental to the interests of the United States," and she can set the number of refugees permitted to enter the United States by "determin[ing]" the number "justified by humanitarian concerns or . . . otherwise in the national interest."[16]

These are extremely serious powers, all of which require predicate findings. The President cannot make all these findings and exercise these powers arbitrarily without any required procedures. Or so I will argue.

In particular, the President has an existing positive duty to deliberate. This duty is not grounded solely in Founding-era conceptions of what "faithful" execution requires—although such conceptions support it[17]—but is based primarily in the most common source of positive constitutional law today: Supreme Court precedent.[18] Scholars

14. Legal Auths. Available to the President To Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petrol. Prods., 6 Op. O.L.C. 644, 651, 685 (1982).

15. 54 U.S.C. § 320301(a)–(b).

16. 8 U.S.C. §§ 1182(f), 1157(a).

17. *See infra* Part II.A.

18. As discussed *infra* in Part II.A, recent scholarship on the original public meaning of the faithful execution clauses has suggested that these clauses require the President to be "diligent," "conscientious," or use "reasonable care." Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2179 (2019); Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1, 5 (2019). These conceptions certainly support the duty discussed below. But even if one accepts that these terms bind the President—and I have also suggested similar obligations can be derived from the Take Care Clause's text, *see* Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 855–56 (2019)—it is hard to know what such requirements mean concretely for regulating the President today without evaluating other sources of law. To help flesh out such meaning, this Article focuses primarily on Supreme Court precedent and historical

have yet to conduct a thorough examination of Supreme Court precedent to determine what procedures the Court believes the President must abide by.[19] Doing so turns out to be quite illuminating. A review of a wide variety of Supreme Court case law evaluating presidential exercises of power—ranging from cases on the nondelegation doctrine, to deference to presidential judgment, to the presumption of regularity, to executive privilege, to the veto power, to the Court's most recent foray into this field in *Trump v. Hawaii*[20]—reveals that the Court has long assumed that the President is under a duty to gather relevant information and make a considered judgment based on it before exercising power.[21] To be sure, the Court has not addressed the President's first-order procedural obligations explicitly[22] or put the

branch practice. Looking beyond original public meaning might also speak to skeptics of these originalist accounts. Non-originalists are unlikely to be convinced by these accounts and even those inclined to agree with originalism might not agree with the precise originalist methodology used. *See, e.g.*, *infra* note 123. By focusing on Supreme Court precedent and a history of internal executive branch advice the hope is to identify more concrete procedural requirements that bind the modern President based on a more robust and perhaps less contestable source of law.

19. Existing scholarship has certainly touched on the procedural obligations of the President, but this work has tended to focus on the proper mode of judicial review for presidential orders. *See, e.g.*, Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743 (2019) (arguing for the need for a clear legal framework for judicial review of presidential orders); David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013 (2018); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171 (2009) [hereinafter Stack, *Reviewability*] (arguing that executive orders should be subject to ultra vires review); Stack, *The Statutory President*, *supra* note 6, at 570. Others have focused on the original public meaning of the "faithful execution" clauses of the Constitution. *See* Kent et al., *supra* note 18; Bernick, *supra* note 18. Another line of scholarship has examined the President's use of various procedures as a matter of *practice* rather than what is required by positive law. *See, e.g.*, Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187 (2018); JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 (2012). This scholarship is all extremely valuable, but it has not focused on the President's first-order procedural requirements as a matter of positive law based primarily on existing Supreme Court precedent. As noted above, by focusing on the President's legal obligations as established by Supreme Court precedent, the hope is to provide a more easily applicable and perhaps less contestable foundation than relying solely on originalist methods. *See infra* Part II.A. And by focusing on the President's positive legal obligations, we might avoid protracted and difficult to reconcile normative debates over the optimal form of judicial review in the abstract by tying the form of judicial review directly to the President's existing positive legal obligations. *See generally* Part III.A.

20. 138 S. Ct. 2392, 2400 (2018).

21. *See infra* Part II.B.

22. By first-order obligations, I mean obligations imposed on the President by Article II of the Constitution or by statute that attach regardless of whether those obligations are enforced by judicial review. *See, e.g.*, Hans A. Linde, *Due Process of Lawmaking*,

duty quite in this way. But an examination of Supreme Court case law on presidential power establishes that the Court has long assumed the President must engage in deliberation before exercising power.[23] Moreover, a review of internal executive branch legal opinions since the Founding era reveals that the President's top legal advisers have also long assumed the President is bound by a duty to deliberate.[24]

With clarity about the president's procedural duties, we can identify several concrete pathways for ensuring those obligations are enforced. First, once we understand the President's positive duty to deliberate, determining how courts ought to review presidential directives becomes rather straightforward. Courts can simply engage in procedural review to ensure the President has gathered relevant information and made a considered judgment informed by such evidence. Typically, this will require the President to explain that she has consulted with experts within the executive branch and made a decision informed by such consultations or explain why she was justified in not doing so. Looking to the President's positive legal obligations thus might help provide a starting point for recent debates over the proper mode of judicial review of presidential orders, which have been primarily normative in nature, by tying the form of judicial review directly to positive law.[25]

Second, and potentially most consequentially, the President herself can help ensure that this duty is complied with. Due to a wide variety of justiciability, standing, and deference doctrines, exercises of presidential power will rarely result in judicial review.[26] By far the most impactful way to ensure the President abides by her procedural obligations is for the President to impose procedural requirements on herself. The President might well have the incentive to impose such requirements going forward,[27] and doing so could be relatively

55 NEB. L. REV. 197, 206 (1976) ("[C]onstitutional directives for what to do and what not to do in making and administering law are addressed to government in the first instance, and to judges only upon a claim that government has disregarded such a directive."); *id.* at 244 ("It is not mere theory to distinguish between constitutional law and judicial review."); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1264 (2017); *cf. Trump v. Hawaii*, 138 S. Ct. at 2424 (Kennedy, J., concurring) ("There are numerous instances in which the . . . actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution . . . .").

23. For responses to potential counterarguments to the existence of such a positive duty, see *infra* Part II.B.7.

24. *See infra* Part II.C.

25. *See generally infra* Part III.A.

26. *See infra* note 228 and accompanying text.

27. *See infra* Part III.B.

simple. Presidents already procedurally regulate how written directives, such as executive orders and proclamations, are approved. To ensure that the President is abiding by the duty to deliberate, the President could simply amend the existing order that governs how these directives are issued and require that they go through an interagency process of information gathering and review before they are promulgated, at least absent some emergency circumstance. Such interagency review is already common practice, but it is not required by the formal order governing such directives, and it is not always conducted. Imposing such a formal requirement would thus likely improve compliance with the duty to deliberate.[28]

Identifying the duty to deliberate also helps illuminate a perplexing pattern of conduct during the Trump administration. President Trump frequently issued seemingly off-the-cuff directives to subordinates only to have them ignored.[29] With the duty to deliberate in mind, we can see that these attempted exercises of power were, in fact, unlawful because the President had made the decision impulsively, arbitrarily, and without gathering relevant information and making a considered judgment based on it. Although these instances of noncompliance may not have been consciously motivated by this realization, identifying the duty can help justify them. More importantly, it points toward a way to prevent them in the future: The President could formally require that future presidential directives should not be obeyed if they are not preceded by due deliberation.

Finally, Congress could help ensure the President abides by her duty by passing a framework statute requiring such deliberation before the President exercises power delegated to her by statute. Such a requirement would be presumptively constitutional but could be unconstitutional in particular instances if it failed standard separation of powers balancing.[30]

28. *See infra* Part III.B.

29. *See infra* Part III.B (listing examples). For example, subordinates ignored the President's initial order requiring a transgender military ban, his directive to reinstate certain honors to a pardoned Navy SEAL, to evacuate troops from South Korea, as well as his initial order to fire the ambassador to Ukraine. *See infra* note 241. More broadly, former Secretary of Defense James Mattis reportedly repeatedly "simply ignored the president's directives, considering them insufficiently thought through." Dexter Filkins, *Trump's Public-Relations Army*, NEW YORKER (June 6, 2020), https://www.newyorker.com/news/daily-comment/trumps-public-relations-army [https://perma.cc/946K-MWZN].

30. *See generally infra* Part III.C. In particular, it would be unconstitutional in instances where it "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions" and such impact was not "justified by an overriding need

Identifying the duty to deliberate thus reveals what the President's baseline procedural obligations are and how best to enforce them. But a glaring normative question remains: is it normatively *sufficient* for the President to exercise such a vast array of powers in both the foreign and domestic realm simply by consulting internal executive branch actors and making a considered judgment? We certainly would not think it legitimate for agencies to issue rules or adjudicate disputes after only consulting and considering such actions internally. So, how do we evaluate the legitimacy of the President's exercising analogous power with these relatively minimal procedural obligations?

The existing literature on the topic tells us fairly little about this question. Although there has been an enormous body of scholarship on "presidential administration," that scholarship has focused on the President's role in influencing *agency* action.[31] It has conceived of the President as playing a legitimating role *on top of* agency procedures, not *in lieu of them*. This scholarship has not focused on what procedural obligations might be needed to legitimate the *President's* exercise of power delegated directly to her. But a close look at this literature reveals that even defenders of the President's legitimating role in influencing agency conduct are uncomfortable with the idea of the President exercising analogous power on her own without abiding by anything close to the procedural strictures required of agencies. In short, if we take the existing literature on the legitimacy of the administrative state seriously, it raises real questions about the normative sufficiency of the existing procedural obligations on the President. But to understand how and when we ought to bolster these procedural requirements, we will need more information about when precisely the President is delegated power, how Congress currently procedurally regulates such delegations, and a better understanding of why Congress delegates power to the President, rather than agency heads, in the first place. While such a project necessarily lies beyond the scope of this Article, the hope is to lay the groundwork for such exploration.

to promote objectives within the constitutional authority of Congress." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977).

31. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Politicization*, 76 GEO. WASH. L. REV. 1095 (2008); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016).

Before moving to the body of the Article, it is worth putting the import of identifying the President's procedural duties into relief. If the President truly has no procedural obligations in exercising power, then the President could issue environmental regulations, ration energy consumption, seize private property, classify information, use military force abroad, or call out the militia at home all based on a whim—without gathering any relevant information, without considering such information, without thinking through the effects of acting, indeed without thinking anything through at all.[32] When put this way, the notion that the President can exercise all these powers arbitrarily—that she has *no* procedural obligations—seems hard to square with an office of the presidency limited by law that our Constitution contemplates.[33] This Article seeks to make headway in identifying whether such procedural obligations in fact exist, where they come from, what they might entail, how they might be enforced, and how they might be improved.

The Article proceeds as follows. Part I provides a survey of the breadth of substantive powers delegated to the President by name by the Constitution, as well as by statute. Having laid out the breadth of

32. For another extremely valuable and contemporaneous critique of this notion, see Matthew Steilen, *Presidential Whim*, 46 OHIO N.U. L. REV. 489 (2020).

33. The Constitution limits the President's power to that which is delegated to her—either by the Constitution or by statute. All the powers mentioned here whether delegated by the Constitution or by Congress are conditioned on the President making certain factual or policy findings. *See infra* notes 34–38 and accompanying text. If the President can make all these findings arbitrarily—without going through any procedures at all—it is hard to say that she is exercising the powers delegated to her, rather than exercising whatever power she feels like. *See, e.g.*, LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 595 (1965) ("The 'law' does not operate in a vacuum. The application of law requires a factual predicate; an action without such a predicate is lawless. A finding of fact which is based on no more than the will or desire of the administrator is lawless in substance if not in form."); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("Either the statute means that the President is to adhere to the declared policy of Congress, or it means that he is to exercise a merely arbitrary will. The one construction invigorates the act; the other saps its life. A choice between them is not hard."); *id.* at 448 ("If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfillment, there is in truth no delegation, and hence no official action, but only the vain show of it."). Of course, even if such procedural obligations exist, this does not mean compliance with such obligations is judicially reviewable. Even so, it remains important to clarify what first-order obligations bind the President for a number of reasons, including enabling better public accountability, congressional oversight, the identification of appropriate internal executive branch constraints, and the proper form of judicial review. *See, e.g.*, Roisman, *supra* note 18, at 853–54 (explaining why identifying first-order obligations is important even if the obligations are not judicially enforced).

the President's power, Part II asks what procedural obligations apply to the President when she exercises such power. It first shows how the constitutional text supports a duty to deliberate but focuses primarily on how Supreme Court case law supports the existence of such a duty. It then shows how internal executive branch actors have also long assumed such a duty applies to the President. It concludes by discussing the scope of the duty and what it entails. Part III then asks how such a duty might be enforced by courts, by the President, and by Congress. Finally, Part IV examines the normative sufficiency of the duty to deliberate, given the vast array of powers delegated to the President. A brief conclusion follows.

I. THE BREADTH OF PRESIDENTIAL DELEGATION

Before delving into the procedural law that binds the President, it is worth addressing the stakes of identifying such procedural requirements. They are enormous. As this Part shows, the President is delegated a vast array of power in all areas of life, foreign and domestic. The question of what procedural law binds the President is thus the question of whether the President can exercise powers relating to freezing prices in the economy, cleaning up oil and chemical spills, calling out the militia or sending military forces abroad all on a whim, or whether the President must go through some procedures before doing so. This Part first, very briefly, surveys the substantive constitutional powers delegated to the President before providing a more in-depth survey of the statutory field of presidential delegation.

Before beginning the survey of powers, it is worth clarifying that all the powers discussed below are *conditional*. This means that before exercising any of these powers, the President must first make a certain finding that a condition—either of fact or policy judgment—has been or will be met. In earlier work, I have explained that constitutional or statutory delegations to the President can be divided into three categories: (1) Pure Fact Powers; (2) Mixed Fact and Policy Powers; and (3) Pure Discretion Powers.[34] Pure Fact powers require the President to make a finding of fact before exercising power; Mixed Fact and Policy Powers require the President to find relevant facts and, based on those facts, determine if the exercise of power meets the judgmental policy criteria the Constitution or Congress has set forth; and Pure Discretion powers allow the President to act before making any particular factual finding or policy judgment.[35] These three categories are not

34. *See* Roisman, *supra* note 18, at 845–52.

35. *See id.* at 846–47.

hermetically sealed but rather operate on a spectrum.[36] So while line-drawing problems remain, the point to see is that for powers in categories (1) or (2)—Pure Fact or Mixed Fact and Policy Powers—before the President can exercise power she must first find that a certain fact in the world exists or that certain conduct would fulfill some policy interest, for example, that it is necessary to protect the "national defense" or that it is in the "paramount interest of the United States."[37] All the powers discussed below fall into categories (1) or (2)—they require the President either to find particular facts or make a particular policy judgment before exercising power—and the duty discussed in Part II applies to such exercises of power.[38]

A. CONSTITUTIONAL POWERS

As is well known, the Constitution delegates a wide array of powers directly to the President. For example, the President has the power to use military force in certain circumstances, such as to prevent an attack on the United States, protect American lives abroad, or perhaps even to preserve regional stability or prevent humanitarian catastrophes.[39] The President can settle American citizens' claims against foreign states if she determines such settlement is "a necessary incident to the resolution of a major foreign policy dispute between our country and another."[40] She can recognize foreign governments upon finding that the relevant "'entity possesses the qualifications for statehood,' including a defined territory, permanent population, government control, and capacity to engage in international

36. *Id.* at 846.

37. *Id.* at 845–52.

38. The duty identified below may well also apply to purely discretionary powers, to the extent they exist. *Id.* at 851 n.117 (expressing skepticism that many or any delegations are truly purely discretionary). But, given how few of those there are, I found it easier to focus on conditional powers.

39. The breadth of this power is highly contested. *See, e.g.*, CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 658–60 (6th ed. 2017) ("There is general agreement that . . . the President has the power to repel attacks on the United States . . . [and] to use force to protect the lives and property of U.S. citizens abroad."); *id.* at 664 (questioning whether "prevent[ing] a humanitarian catastrophe" or "preserving regional stability" and "supporting the U.N. Security Council's credibility and effectiveness" are the types of "national interests" that warrant unilateral presidential uses of force)*; see also* Roisman, *supra* note 18, at 835 n.31 (collecting sources on the debate).

40. Dames & Moore v. Regan, 453 U.S. 654, 688 (1981).

relations."[41] She has the power to appoint officers[42] and remove lands from public sale if doing so is in the "public interest."[43] She can convene a special session of Congress if she determines there is an "extraordinary Occasion[]," [44] withhold information from Congress based on executive privilege if, "in [the President's] considered view, [releasing it] would be sufficiently detrimental to the public interest," [45] and perhaps take certain measures to preserve order and stability in times of emergency.[46] The scope of each of these powers is subject to robust debate and there are powers that I have not mentioned, but the point is simply that the President has numerous substantive powers that derive from the Constitution.

B. STATUTORY POWERS

What has received far less attention than the breadth of these constitutional powers is the breadth of statutory powers delegated

41. Jack Goldsmith, Zivotofsky II *as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 112 (2015) (quoting RESTATEMENT (THIRD) OF FOREIGN RELS. L. §§ 201, 202 cmt. a (AM. L. INST. 1987)); *see also* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2096 (2015) (noting "the exclusive power of the President to control recognition determinations").

42. U.S. CONST. art. II, § 2. This also likely requires the President to make certain findings. *See, e.g.*, Qualifications of Pub. Printer, 34 Op. Att'y Gen. 96, 97 (1924) (noting that the President "determine[s] whether the particular person appointed possessed the necessary skill to discharge the duties attaching to the position"); The Navy Efficiency Acts, 8 Op. Att'y Gen. 335, 351 (1857) ("These facts [relating to the fitness or unfitness of a person for a particular appointment] it is the duty of the President, in all cases of nomination to office, to determine as he best may, by personal or by communicated knowledge.").

43. *See* United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915) ("Emergencies may occur, or conditions may so change as to require that [the President] should, in the public interest, withhold the land from sale . . . .").

44. U.S. CONST. art. II, § 3.

45. Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231, 251; *see also* Assertion of Exec. Privilege in Response to Cong. Demands for L. Enf't Files, 6 Op. O.L.C. 31, 34–35 (1982); Jonathan David Shaub, *The Executive's Privilege*, 70 DUKE L.J. 1 (2020); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974).

46. This, of course, requires a relevant emergency, and the conduct in question must be necessary to address it. *See, e.g.*, Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 10–11, 32–38 (1993) (suggesting such a power exists); Auth To Use Troops To Prevent Interference with Fed. Emps. by Mayday Demonstrations & Consequent Impairment of Gov't Functions, 1 Supp. Op. O.L.C. 343, 344 (1971) (relying on the "President's constitutional duty to protect th[e] functioning [of the government] and prevent its obstruction"). *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646–51 (Jackson, J., concurring) (rejecting argument that President has "inherent" power to "deal with a crisis or an emergency according to the necessities of the case").

directly to the President by name.[47] Such delegations are not siloed to inconsequential issues, foreign affairs, or military authorities.[48] Rather, direct delegations to the President span all manner of substantive areas including trade, disaster and emergency management, as well as purely domestic powers like combating domestic inflation, setting environmental standards, imposing conditions on government procurement, and creating national monuments. While there is insufficient space to canvass all delegations to the President, this section seeks to provide a short survey of the breadth of powers delegated to the President.

Because there has been less focus on the President's domestic authorities, this Section starts with a more complete survey of these authorities. It then more briefly surveys the array of powers the President has in foreign affairs, the military, national security, and trade.

1. Domestic Powers

This Section surveys the vast array of areas where the President has been delegated power over domestic affairs.

Price Stabilization Powers—The President has often possessed the power to prevent inflation and stabilize prices in the domestic economy.[49] For example, the Economic Stabilization Act of 1970 gave

47. *See supra* note 9. Of course, it has not escaped notice that statutes delegate power directly to the President, but the focus has tended to be on what sort of legal deference courts should give the President when she exercises such powers. For example, Kevin Stack has done a great deal of incredibly valuable work in this area. *See, e.g.*, Stack, *The Statutory President*, *supra* note 6, at 542, 585–97 (arguing the President should receive *Chevron* deference); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Stack, *Reviewability*, *supra* note 19, at 1177 (arguing the President's assertions of statutory powers ought to be subject to ultra vires review); *see also* Kevin Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 1013–20 (2007) (arguing that the President is required to give reasons when acting with binding legal force pursuant to statutory authority). As noted above, there have also been a number of recent efforts to assess how courts ought to review presidential exercises of power, but they have not focused on what the statutory landscape of delegations to the President looks like. *See supra* note 19. Finally, while scholars have spent a great deal of time assessing the President's role in directing the exercise of delegations to agencies in discussing "presidential administration," they have spent comparatively little time assessing the scope and range of power delegated directly to the President, rather than to agencies. *See supra* note 31 (collecting prominent sources on "presidential administration").

48. *See supra* note 9 and accompanying text.

49. *See, e.g.*, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally, 337 F. Supp. 737, 747–48 (D.D.C. 1971) (discussing history of such authorities). The broadest delegations in this area—like that of the Economic Stabilization Act of 1970—are no longer in effect, *see infra* notes 50, 55, but some such powers still remain and there is little reason to think such broad delegation will not return in the future.

the President authority to "stabilize prices, rents, wages, salaries, interest rates, dividends and similar transfers," upon finding that such restrictions were "appropriate," and making "such adjustments as may be necessary to prevent gross inequities."[50] President Nixon used this authority to impose a general ninety-day freeze on prices, rents, wages and salaries in the economy in August 1971.[51] President Carter exercised similar power under the Credit Control Act[52] to authorize the Federal Reserve to regulate certain extensions of credit upon determining that "such action is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume."[53] The relevant regulations sought to "curb[] the volume of credit available" to consumers in the domestic economy by requiring certain financial institutions, such as commercial banks and money market funds, to increase deposits before they could extend consumer credit.[54] These statutes have since expired,[55] but the President continues to have various authorities to combat inflation through means such as initiating policies "for alleviating shortages of goods, services, labor, and capital . . . to aid in stabilizing prices," and establishing "stockpiles of agricultural commodities and other critical materials to help stabilize prices, meet emergency needs, and promote adequate income to producers."[56] The President can also

50. Economic Stabilization Act of 1970, Pub. L. No. 91-379, § 202, 84 Stat. 799, 799–800 ("The President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970. Such orders and regulations may provide for the making of such adjustments as may be necessary to prevent gross inequities."); *see also* John J. Rigby, Note, *The Administration of Economic Controls: The Economic Stabilization Act of 1970*, 29 CASE W. RSRV. L. REV. 458, 458 n.1 (1979) (describing Acts that amended and extended the Economic Stabilization Act of 1970). The Act of May 18, 1971, Pub. L. No. 92-15, sec. 3, § 202(b), 85 Stat. 38, 38 (amending the Economic Stabilization Act of 1970), prohibited the President from singling out a "particular industry or segment of the economy," unless he found that "prices or wages in that industry or segment of the economy have increased at a rate which is grossly disproportionate to the rate at which prices or wages have increased in the economy generally."

51. Exec. Order No. 11,615, 36 Fed. Reg. 15,727, § 1(a) (Aug. 15, 1971).

52. *See* Exec. Order No. 12,201, 45 Fed. Reg. 17,123 (Mar. 14, 1980).

53. The President's Auth. To Regulate Extensions of Credit Under the Credit Control Act, 43 Op. Att'y Gen. 207, 207 (1980) (quoting 12 U.S.C. § 1904 (1976)).

54. *Id.* at 209–10.

55. *See* Rigby, *supra* note 50 (noting the Economic Stabilization Act of 1970 expired April 30, 1974); 12 U.S.C. § 1910 (1988) ("The authority conferred by this chapter expires at the close of June 30, 1982.").

56. 15 U.S.C. § 1022e(c); *see also* 15 U.S.C. § 713d-2(a) (requiring the President to carry out a program of food and feed conservation to alleviate shortages and stabilize prices).

take "such other administrative actions . . . as the President deems desirable, to promote reasonable price stability."[57]

Government Procurement, Organization, and Employment—Apart from these inflation-related powers, the President also has numerous powers relating to government procurement and organization. Perhaps most consequentially, the President has the power to impose regulations on how the government contracts for procurement—which makes up approximately ten percent of gross domestic product[58]—so long as she determines the regulations will promote economy and efficiency.[59] This authority has been used, for example, to ensure government contractors do not engage in housing discrimination or punish striking workers.[60] The President is also tasked with setting "Governmentwide goals" for the federal government to award contracts to small businesses owned by women, service-disabled veterans, and "socially and economically disadvantaged" individuals.[61] The President is also delegated power to issue regulations to require cars bought or leased by executive branch agencies to achieve a minimal average fuel economy[62] and to ensure contracting employers take "affirmative action" to employ "qualified individuals with disabilities."[63]

Outside of the government contracting space, the President has numerous powers relating to government employees. She is tasked with issuing regulations governing admission into the civil service that "will best promote the efficiency of that service," and in particular she has the power to "ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment

57. 15 U.S.C. § 1022e(c).

58. *See* ORG. FOR ECON. CO-OPERATION & DEV., GOVERNMENT AT A GLANCE 2017, at 173 fig.9.1 (2017), https://www.oecd-ilibrary.org/docserver/gov_glance-2017-en.pdf [https://perma.cc/2PR8-JMYH].

59. *See* Auth. To Issue Exec. Ord. on Gov't Procurement, 19 Op. O.L.C. 90, 90 (1995) (concluding that the President can promulgate regulations governing procurement contracts if she determines regulations "will promote economy and efficiency in government procurement"); 40 U.S.C. §§ 101, 121(a) ("The purpose of this subtitle is to provide the Federal Government with an economical and efficient system for [procurement,]" and the "President may prescribe policies and directives that the President considers necessary to carry out this subtitle.").

60. *See, e.g.*, Robert B. Cash, Note, *Presidential Power: Use and Enforcement of Executive Orders*, 39 NOTRE DAME LAW. 44, 45 (1963–1964) (discussing housing discrimination order); Auth. To Issue Exec. Ord. on Gov't Procurement, *supra* note 59, at 91 (discussing executive order barring government agencies from contracting with employers that permanently replace striking workers).

61. 15 U.S.C. § 644(g)(1).

62. 49 U.S.C. § 32917(b).

63. 29 U.S.C. § 793(a).

sought."[64] The President is tasked with calculating locality pay adjustments for federal employees[65] and determining the compensation of certain commission members.[66] The President also has power to implement various employment protections on government agencies, including by issuing regulations enforcing the Civil Rights Act, Age Discrimination in Employment Act, the Americans with Disabilities Act, Family and Medical Leave Act, and the Fair Labor Standards Act.[67]

Appropriations and Debt Ceiling—The President has the power to close appropriation accounts and cancel remaining balances if she "determines that the purpose for which the appropriation was made have been carried out"[68] and to approve borrowing past the debt ceiling if she determines that spending is within a certain amount of the existing limit and that "further borrowing is required to meet existing commitments."[69]

Environment, Public Lands, Energy, and Agriculture—Apart from these powers relating to government organization and spending, the President also has numerous authorities relating to the environment, public lands, energy, and agriculture.

For example, the President has the power to determine "by regulation" the prohibited amount of "quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States."[70] The President is also delegated the power to publish a highly consequential set of regulations called the "national contingency plan," which establishes the procedures for the federal response to oil and chemical spills, including methods to remove such hazardous materials, how to discover which facilities are releasing them, "provision for identification, procurement, maintenance, and storage of response equipment and supplies," as well as methods to "identify[], remov[e], or remedy[] releases of hazardous substances."[71] The President has a separate power to clean up oil spills and to give loans to affected fishermen

64. 5 U.S.C. § 3301(1)–(2).

65. *Id.* § 5304(a)–(d).

66. 42 U.S.C. § 1962b-5(c).

67. 3 U.S.C. §§ 411–413, 421.

68. 31 U.S.C. § 1555.

69. *Id.* § 3101A(a).

70. 33 U.S.C. § 1321(b)(3)–(4). This authority has been subdelegated by the President but could, of course, be taken back and exercised by the President if she desired.

71. 42 U.S.C. § 9605(a). The President can also acquire real property if doing so is "needed to conduct [such] a remedial action." *Id.* § 9604(a), (j)(1).

under such "flexible terms, as [she] determine[s]."[72] And the President has a range of powers to exempt federal agencies from compliance with various environmental regulations if she determines doing so is in the "paramount interest of the United States."[73]

Apart from these environmental powers, the President has the power to create national monuments by proclaiming that there are "historic landmarks" or "other objects of historic or scientific interest . . . situated on land owned or controlled by the Federal Government" and ensuring the protected area is confined to "the smallest area compatible with the proper care and management of the objects to be protected."[74] The President can also authorize prospecting for water resources and the establishment of power projects, transmission lines, or road construction in national forests so long as she determines such uses of "the specific area will better serve the interests of the United States and the people thereof than will its denial."[75]

The President also has power to decide the appropriate system for certain crude oil transport upon considering "the environmental impacts of the proposed systems," "transportation costs and delivered prices of crude oil by region," "construction schedules," and the "net national economic costs and benefits of each such system."[76] And the President can suspend deep sea exploration or prohibit licensing of such exploration upon making certain findings.[77]

The President also has agriculture-related powers, such as the authority to dispose of commodity set-asides through various means, including "donation to school-lunch programs."[78]

Domestic Emergencies—While it is now relatively well-known that the President has power to respond to foreign-based emergencies, she also has authority to respond to domestic emergencies. The President can declare a "severe energy supply interruption," giving

72. 33 U.S.C. §§ 2711–2712, 2713(e)–(f). The President can also assess civil penalties on shipping vessels that carry inadequate insurance upon taking into account the "nature, circumstances, extent, and gravity of the violation." *Id.* §§ 2716(a), 2716a(a).

73. *See, e.g.*, 16 U.S.C. § 1456(c)(1) (coastal zone management requirements); 33 U.S.C. § 1323(a) (federal facilities pollution control); 42 U.S.C. § 300h-7(h) (wellhead protection requirements); *id.* § 4903(b) (noise emission regulations); *id.* § 8373(a) (powerplant and industrial fuel use regulations).

74. 54 U.S.C. § 320301(a)–(b); *see also* 16 U.S.C. § 81a (requiring the President to establish boundaries of "Colonial National Historical Park" in Virginia).

75. 16 U.S.C. § 1133(d)(4).

76. 43 U.S.C. § 2007(a)–(b).

77. 30 U.S.C. § 1411(b)(2).

78. 7 U.S.C. § 1743(a).

her a range of powers including the power to ration or prohibit certain uses of fuels, like coal or petroleum, as well as to draw down the Strategic Petroleum Reserve.[79] Similarly, if the President declares a "natural gas supply emergency" she can order the prohibition of burning natural gas by power plants[80] and subpoena witnesses or documents or require people to submit answers to "interrogatories" in order to gather information to aid in her response.[81]

The President can also provide funding for "small impoverished communit[ies]" for "predisaster hazard mitigation measures," order the removal of debris resulting from major disasters from domestic public or private lands, and provide local governments and private actors grants to do so.[82] The President can provide financial assistance, temporary housing, and money for repairs or replacement for those "displaced from their . . . primary residences."[83] And the President can provide medical, dental, childcare, funeral, and transportation expenses to those adversely affected by a major disaster.[84]

If the President determines there is a "major violent crime or drug-related emergency," the President can send federal "personnel, equipment, supplies, facilities, financial assistance" and provide "law enforcement-related intelligence information" upon determining such assistance is needed "to save lives, and to protect property and public health and safety."[85]

Immigration—The President also has important immigration authorities. As made famous by President Trump's "Travel Ban," the President can bar the entry of certain classes of aliens if she determines their entry would be "detrimental to the interests of the United States."[86] The President also sets the cap for the number of refugees permitted into the United States by determining the number "justified by humanitarian concerns or . . . otherwise in the national interest."[87] Beyond the ability to regulate who can enter the country, the

79. *See, e.g.*, 42 U.S.C. § 6241(d) (Strategic Petroleum Reserve drawdown and sale authority); *id.* § 8374 (coal allocation authority, prohibition on use of natural gas or petroleum); *id.* § 8511(a) (set conservation targets).

80. 15 U.S.C. § 717z(a)–(c).

81. *Id.* § 3364(a)(1).

82. 42 U.S.C. §§ 5133, 5173.

83. *Id.* § 5174(a)–(b).

84. *Id.* § 5174(e) (outlining financial assistance to address such needs).

85. 34 U.S.C. § 12523(a), (c), (g).

86. 8 U.S.C. § 1182(f); *see infra* notes 172, 237–39 and accompanying text (discussing President Trump's "Travel Ban").

87. 8 U.S.C. § 1157(a)(2).

President has power to monitor, evaluate, and potentially modify employment verification systems.[88]

2. Foreign Affairs, Military, and National Security

As is perhaps less surprising, the President has a vast array of foreign affairs and military statutory powers. With respect to foreign affairs, the President has numerous powers to sanction both individuals and countries upon making particular findings that, for example, individuals have engaged in cyberattacks on U.S. democratic institutions or that countries have tolerated "severe violations of religious freedom" or used chemical weapons.[89] The President also has numerous authorities to grant foreign assistance to countries upon making certain findings, such as that the aid will help alleviate hunger or stop malaria.[90]

In terms of military powers, the President can waive statutory limits on military end strength if she declares an emergency,[91] waive requirements for appointing combatant commanders in a number of different services,[92] and issue regulations governing disability and death compensation for service members.[93] The President can also determine who has "distinguished himself conspicuously by gallantry and intrepidity at risk of his life above and beyond the call of duty" such that a medal of honor is deserved,[94] determine which soldiers can receive benefits for being held in "captive status," adjust monthly pay, and adjust the "components and quantities of navy rations" upon

88. *Id.* § 1324a(d) (authority to monitor and change employment verification system).

89. 22 U.S.C. §§ 6442, 6445 (religious freedom); *id.* § 9524(a) (Russian cyberattacks). The President can also sanction individuals for, among other things, being complicit in corruption in Russia, undermining peace or security in Ukraine, being complicit in human rights abuses, participating in economic sectors in Iran, and knowingly aiding a chemical weapons program. *See id.* § 8908 (Russia); *id.* § 8907 (Ukraine); *id.* § 8910(a) (human rights abuses); *id.* § 8803 (Iran); 50 U.S.C. § 4613 (chemical weapons).

90. *See, e.g.*, 7 U.S.C. § 1728a (food for peace); 22 U.S.C. § 2151b-4 (malaria). The President also has authority to provide aid to help countries reduce their dependence on the production of drug crops, to provide long-term development assistance for sub-Saharan Africa, to provide human rights security assistance, as well as assistance for refugees and migration. *See* 7 U.S.C. § 1736g-1(b) (drug crops); *id.* § 1728a (food for peace); 22 U.S.C. § 2293 (sub-Saharan Africa); *id.* § 2304 (human rights assistance); *id.* § 2601 (refugees and migration).

91. 10 U.S.C. § 123a.

92. *Id.* §§ 154, 164, 8033, 8043.

93. *Id.* § 1032.

94. *Id.* § 7271.

determining the "economy and health and comfort of the members . . . require such action."[95]

During war, the President has tremendous power to seize property, apprehend and remove foreign nationals, and procure ships and other war material.[96] And, outside wartime, the President can "create, maintain, protect, expand, or restore domestic industrial base capabilities essential for national defense."[97] This power includes the ability to purchase industrial resources or critical technology, develop production capacities, encourage "exploration, development, and mining of critical and strategic materials," and provide subsidies for developers of such materials.[98] The President also has wide-ranging power to obtain information through "subpoena, or otherwise" including by inspecting books, records, other writings, or property of "any person as may be necessary or appropriate, in his discretion, to the enforcement or the administration of" the President's defense production authorities.[99]

The President also has the authority to call out the militia or the armed forces domestically "to suppress . . . any insurrection, domestic violence, unlawful combination, or conspiracy" that "so hinders the execution of the laws of" the relevant state, such that people are deprived of their legal rights, and state authorities "are unable, fail, or refuse to protect that right."[100]

The President can block any merger, acquisition, or takeover transaction that could result in foreign control of any U.S. business if she determines the transaction "threatens to impair the national security of the United States" upon finding "credible evidence . . . to believe that a foreign person that would acquire an interest in a United States business or its assets as a result of the covered transaction might take action that threatens to impair the national security."[101]

And as is now relatively well-known, the President has enormous power upon declaring foreign policy "emergencies," even outside

95. 37 U.S.C. § 559 (captive status); *id.* § 1009(e) (adjust monthly pay); 10 U.S.C. § 8242 (Navy rations). The President can also issue regulations governing disability and death compensation and waive consent requirements for drug tests on military members. *See* 10 U.S.C. §§ 1032, 1107.

96. 50 U.S.C. § 4307 (property seizure); *id.* § 2404 (prohibit exports); *id.* § 21 (expel foreign nationals); *id.* § 82 (ships and material); *id.* § 98h-4 (import strategic materials).

97. *Id.* § 4533.

98. *Id.*

99. 50 U.S.C. § 4555(a).

100. 10 U.S.C. § 253.

101. 50 U.S.C. § 4565(d).

wartime.[102] For example, under the International Emergency Economic Powers Act, the President can regulate or prohibit foreign exchange transactions, transfers of credit, transfers of securities, payments, and can take or freeze assets, block property and interests in property, and deny entry into the United States.[103]

3. Trade

The President also has numerous trade and export authorities. The President can impose fees on imports if she investigates and concludes that such imports would "reduce substantially the amount of any product processed in the United States."[104] The President can impose duties if she finds a foreign country has imposed burdens on products of the United States that are not "equally enforced upon the like articles of every foreign country" and such duties would serve "the public interest."[105] The President can impose import charges if she determines restricting imports will help "with large and serious United States balance-of-payment deficits" or prevent depreciation of the dollar.[106] And the President can designate countries "beneficiary developing countries" granting them preferential treatment.[107] Finally, the President has numerous authorities to enter into trade agreements with foreign countries, including highly consequential agreements like the Transpacific Partnership, upon finding they will meet certain congressional goals.[108]

C. THE STAKES

What comes into view upon reviewing this survey of powers delegated to the President is how broad an array of consequential powers

102. Elizabeth Goitein, *The Alarming Scope of the President's Emergency Powers*, ATLANTIC (Jan./Feb. 2019), https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418 [https://perma.cc/3X4Y-68CW] ("The moment the President declares a 'national emergency' . . . more than 100 special provisions become available to him."); *see also A Guide to Emergency Powers and Their Use*, BRENNAN CTR. FOR JUST. (Apr. 24, 2020), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use [https://perma.cc/S7RK-AU88] (cataloguing the breadth of presidential emergency powers).

103. *See* 50 U.S.C. §§ 1701–1707; CHRISTOPHER A. CASEY, IAN F. FERGUSSON, DIANNE E. RENNACK & JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 25–26 (2019) (listing powers granted to the President by IEEPA and uses of this authority by past presidents).

104. 7 U.S.C. § 624(a)–(b).

105. 19 U.S.C. § 1338(a).

106. *Id.* § 2132(a); *see also id.* § 2136 (on reciprocal nondiscriminatory treatment).

107. *Id.* § 2462.

108. *See, e.g.*, *id.* § 4202 (trade agreements authority).

the President has. The President has vast domestic and foreign affairs powers delegated directly to her—powers that, if exercised by agencies, would typically be subject to well-known and reticulated administrative law requirements. Once we see this range of power, the stakes of answering the question of whether the President has procedural obligations comes into view.

To say that the President has *no* procedural obligations is to say that the President can exercise all these powers arbitrarily.[109] It is to say that Richard Nixon could freeze prices and wages in the economy without going through *any process* at all.[110] It is to say that President Carter could limit consumer credit in the economy by finding such action was "necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume"[111] on a whim. It is to say that the President can decide "by regulation" the amount of prohibited "hazardous substance" that could be discharged without consulting any experts or gathering any information.[112] It is to suggest the President can ration energy use upon declaring an energy supply emergency without investigating whether such an emergency actually exists or how best to deal with it.[113] In short, it is to say the President can exercise vast control over our country arbitrarily.

Can it be that the President can exercise such powers without any procedure at all? If not, what procedures must the President abide by as a matter of positive law? The next Part seeks to answer these questions.

109. To clarify, I use the word "arbitrary" here and throughout this Article not in a technical legal sense, such as the word is used in administrative law's "arbitrary and capricious" review. *See, e.g.*, 5 U.S.C. § 706(2)(A); Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (discussing standard test for "arbitrary and capricious" review). Rather, I use the word in its ordinary sense in common speech—to mean that a choice was made essentially at random or based on personal whim, rather than based on reason, reasonable process, or consideration. *See, e.g.*, *Arbitrary*, MERRIAM-WEBSTER (Sept. 2020), https://www.merriam-webster.com/dictionary/arbitrary [https://perma.cc/J7CE-XVPP] ("existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will"); *Arbitrary*, OED ONLINE (Sept. 2020), https://oed.com (search "arbitrary") ("Derived from mere opinion or preference; not based on the nature of things; hence, capricious, uncertain, varying.").

110. Exec. Order No. 11615, 36 Fed. Reg. 15507, 15727 (Aug. 17, 1971).

111. The President's Auth. To Regulate Extensions of Credit Under the Credit Control Act, 43 Op. Att'y Gen. 207, 208 n.2 (1980).

112. 33 U.S.C. § 1321(b)(3)–(4).

113. 42 U.S.C. § 6202(8).

II. THE PRESIDENT'S DUTY TO DELIBERATE

This Part argues that the President has existing procedural obligations in exercising power that is delegated directly to her. The President has a duty to deliberate, i.e., to gather relevant information and make a considered judgment based upon that information before exercising power.[114]

My method for deriving this duty is quite standard, but it has yet to be done with respect to the President's procedural obligations. I start, as is typical, with the text of the Constitution. I find that the Constitution's text supports such a duty but may not be concrete enough to firmly establish it. So rather than relying solely on the text, I explore the primary source of positive constitutional law today: Supreme Court precedent. The scholarship in this domain has not attempted a thorough exploration of what Supreme Court cases examining presidential power have to say about the President's existing procedural obligations. And, it turns out that they say quite a lot. Although the Court has not addressed the President's procedural obligations explicitly, it has made clear in a wide variety of substantive areas that it views the President as tasked with gathering relevant information and making a considered judgment before exercising power delegated directly to her. Unearthing this duty may make it seem novel, but it is also supported by a long history of internal executive branch opinions that also assumed the President is tasked with gathering relevant information and making a considered judgment before exercising power. Below, I first show how the text supports such a duty, then focus primarily on how Supreme Court precedent supports it, before discussing the long history of internal executive branch advice that also supports the duty. This Part then examines whether the duty applies to constitutional as well as statutory authorities and concludes by discussing what the duty entails.

A. TEXT

The text of the Constitution suggests the President has procedural obligations in exercising power. The Take Care Clause requires that the President "shall take care that the Laws be faithfully executed."[115] According to Founding-era dictionaries, to be "faithful"

114. As with many procedural obligations, this duty is a *standard*—what precisely it will require in each instance might change depending on the condition that triggers the power. *See infra* Part II.E.

115. U.S. CONST. art. II, § 3 (Take Care Clause). The Oath Clause also requires "faithful" execution. *See* U.S. CONST. art. II, § 1 ("Before he enter on the execution of his office, he shall take the following [o]ath or [a]ffirmation:—'I do solemnly swear (or affirm)

execution must be done "[w]ithout failure of performance; honestly; exactly."[116] Recent groundbreaking work on the original public meaning of the term suggests that to qualify as "faithful," execution must be done "diligently" or "care[fully]."[117] From this we might easily conclude that if there is a duty to exercise power "diligently," "care[fully]," or "without failure of performance" then something must be *performed*—some internal process must be used.[118] Thus, if a power requires some predicate factual or policy determination to be made—as is true of all the powers discussed above[119]—for that determination to be made "diligently," "care[fully]," or "without failure of performance," the President must gather relevant information, evaluate it, and make a considered, careful judgment about whether the relevant determination can be made.[120] The President need not go to the ends of the earth, but she must do what any reasonable fiduciary agent

that I will faithfully execute the office of President of the United States[.]'"); *see also* Kent et al., *supra* note 18, at 2113 (discussing faithful execution duty). Of course, the Due Process Clause of course bears on presidential action, at least where deprivations of life, liberty, or property are at issue. *See* U.S. CONST. amend. V ("No Person shall . . . be deprived of life, liberty, or property, without due process of law."). Because I am examining the President's first-order obligations regardless of whether a protected Due Process interest is implicated, in this Section, I focus on the obligations imposed by Article II of the Constitution.

116. *See, e.g.*, Roisman, *supra* note 18, at 855 (quoting *Faithfully*, 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington eds., 6th ed. 1785)); *accord* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1857–58 (2016) (quoting Founding-era dictionaries as stating the same or similarly in defining "faithful"); Kent et al., *supra* note 18, at 2118 ("[F]aithful execution was repeatedly associated in statutes and other legal documents with true, honest, diligent, due, skillful, careful, good faith, and impartial execution of law or office."). This is also consistent with modern definitions of the term "faithfully." *See* Roisman, *supra* note 18, at 856 n.140.

117. *See, e.g.*, Kent et al., *supra* note 18, at 2179 ("[T]he President must act diligently and in good faith, taking affirmative steps to pursue what is in the best interest of his national constituency. . . . The command of diligence, care, and good faith contain an affirmative, prescriptive component.").

118. I have made an analogous argument relating to the President's finding of predicate facts but excluded the exercise of policy judgment from the analysis. *See* Roisman, *supra* note 18, at 856 ("This requirement of 'performance' or 'exact[itude]' suggests that the President must engage in some sort of reasonable inquiry—some process—to find these facts."); *see also* Kent et al., *supra* note 18, at 2190 ("[F]aithful execution requires affirmative effort on the part of the President to pursue diligently and in good faith the interests of the principal or purpose specified by the authorizing instrument or entity.").

119. *See supra* note 34 and accompanying text.

120. *See* Roisman, *supra* note 18, at 856; *see also* Bernick, *supra* note 18, at 5 (arguing that the Take Care Clause requires that the President "must exercise that [delegated] discretion with reasonable care"); Kent et al., *supra* note 18, at 2179.

would do to "faithful[ly]" fulfill the task of making a relevant determination.[121]

But, while the plain text and the fiduciary principles thought to attach to it support some procedural duties—including a duty to gather information and make a considered judgment based on such information—the terms of the Take Care Clause are famously vague.[122] As much as they might support a duty to deliberate—or many other procedural duties—their vagueness and contestability are thus unlikely to serve as an exclusive foundation for understanding the President's procedural obligations today.[123]

121. *See* Kent et al., *supra* note 18, at 2119 (concluding faithful execution clauses imposed "fiduciary" duties); Bernick, *supra* note 18, at 5 (agreeing with this view).

122. *See, e.g.*, Goldsmith & Manning, *supra* note 116, at 1836 (describing varied and inconsistent use of the "delphic" Take Care Clause).

The Take Care Clause is not the only relevant provision here. The Opinions Clause provides that the President "may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices." U.S. CONST. art. II, § 2. This explicitly gives the President the power to ask principal officers to gather relevant information and give their views in writing. In other words, it provides power to engage in a particular form of deliberation. The permissive language, however, might suggest that the President need not always consult with such officials before exercising power. And, in an important new article, Tara Grove has argued that the Opinions Clause's use of the word "may" "makes clear that the President has no duty to engage in such consultation." *See* Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877, 882, 898 (2020). I agree with Grove that there are instances of exercises of presidential power that do not require such consultation. But even accepting this view, the fact that the Opinions Clause gives the President the explicit power to ask certain officers for written opinions does not mean that the Constitution never requires consultation. It is possible that some exercises of power need not be done via such consultation. For example, if an authority is given to the President by name and she already has all the relevant information, the President would not be mandated to ask for a written opinion (or any opinion) of a principal officer, because faithful execution would not require such a written opinion. So, while it is true that neither the Opinions Clause nor the Take Care Clause require consultation in *every* exercise of power, this does not mean that the Constitution *never* requires consultation. In short, one can reasonably believe both that (1) the President is not always obligated to ask principal officers for written opinions before exercising power, and (2) the President's duty to faithfully execute the law requires her to gather relevant information and make a considered judgment before determining a requisite condition has been satisfied, which will sometimes require consultation.

123. *See supra* note 18. In short, even if one accepts that these terms bind the President, it is hard to know what such requirements mean concretely for regulating the modern President without evaluating other sources of law. And of course, many might not accept that the obligations identified in these originalist accounts bind the President at all. Some do not subscribe to originalism and even those inclined to agree with it might not agree with the precise originalist methodology used. For example, Bernick relies on a distinct "letter" and "spirit" approach to originalism that looks not only to

Rather than seeking to identify and ground the President's procedural duties in contestable claims about either the Founding-era or modern meaning of the term "faithful," this Article takes a different tack. It looks to Supreme Court case law to assess whether the Court has viewed the President as having procedural obligations and what they might entail. It follows this examination of Supreme Court precedent with a survey of how executive branch legal advisers have understood the President's procedural requirements before exercising delegated power. The next two Sections, thus, seek to expand on this principle of "conscientious" or "diligent" execution to show that the President has long been understood, albeit implicitly, to have a duty to deliberate—in particular to gather relevant information and make a considered judgment—before exercising power delegated directly to her.

B. SUPREME COURT PRECEDENT

Looking to Supreme Court case law evaluating presidential exercises of power, we find much more. In a wide variety of substantive areas—ranging from the nondelegation doctrine, to the presumption of regularity, to deference to presidential informational and judgmental advantages, to executive privilege, to the President's veto power, to *Trump v. Hawaii*—the Court has made clear that it viewed the President as under an obligation to gather relevant information and make a considered judgment before making a determination triggering the exercise of presidential power. Although this duty has never been explicitly stated by the Court, it provides the premise for the Court's review of the President's conduct in all these cases. Below, I survey how these cases establish that the Court has long viewed the President as bound by a duty to deliberate before exercising power. I then address a potential counterargument to this doctrinal analysis that the cases

the plain text of the Take Care Clause (the "letter"), but also to what are determined to be the original functions of the clause (the "spirit"). Bernick, *supra* note 18, at 5. Bernick states the "spirit" of the Take Care clause includes "(1) ensuring presidential accountability; (2) facilitating the exercise of bounded presidential discretion; (3) securing the rule of law; and (4) thwarting presidential opportunism." *Id.* at 6. But some might be skeptical that the functions of the "spirit" Bernick identifies are the only functions members of the Founding era would have believed the Clause might serve, and might question how we are to pick among such functions or how these functions ought to be applied to the modern President. Focusing on Supreme Court precedent and the history of internal executive branch advice might help identify more concrete procedural requirements that bind the President today based on a perhaps less contestable source of law.

only typify an assumption about what the President ought to do rather than what she must do.

1. Nondelegation Doctrine

First, a number of nondelegation cases make clear that when the President's power is premised on making certain factual or policy determinations, she must engage in some form of information gathering and reasoned consideration before making the relevant determination.

In one of the foundational nondelegation doctrine cases, *Field v. Clark*, the Court upheld a delegation of authority to impose tariffs on certain foreign countries if the President "deem[ed] [the duties imposed by those countries] to be reciprocally unequal or unreasonable."[124] The Court found that "[t]he words 'he may deem' . . . of course, implied that the president would examine the commercial regulations of other countries . . . and form a judgment as to whether they were reciprocally equal and reasonable, or the contrary, in their effect upon American products."[125] It then found the delegation permissible because the President "was the mere agent of the law-making department to *ascertain* and declare the event upon which its expressed will was to take effect."[126] In short, the Court upheld the Act precisely because the President's *duty* was to *ascertain* the existence of a condition, which he was to do after "examin[ing]" the relevant regulations and "form[ing] a judgment" as to whether the condition was met.[127]

The Court went further to explain that such conditional legislative delegation was common because "[t]here are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore *be a subject of inquiry and determination* outside of the halls of legislation."[128] Again, the Court clearly assumed the President would engage in "inquiry" and then make a "determination" before exercising the relevant power. In short, the Court assumed that when the President is delegated power subject to a condition, before finding the condition satisfied, the President must first gather relevant information and make a considered judgment based on that information.

Another foundational nondelegation case, *J.W. Hampton, Jr., & Co. v. United States*, also supports this duty. There, the Court evaluated a

124. 143 U.S. 649, 680 (1892).
125. *Id.* at 693.
126. *Id.* at 693–94 (emphasis added).
127. *See id.* at 680.
128. *Id.* at 694 (quoting Appeal of Locke, 72 Pa. 491, 499 (1873)).

delegation allowing the President to adjust import duties whenever the President determined such adjustment necessary to "equalize . . . differences in costs of production in the United States and the principal competing country."[129] In upholding the delegation, the Court noted that "it was presumed that the President would through [the] body of advisers [provided by the statute to assist him in obtaining needed data and ascertaining the facts justifying readjustments] keep himself advised of the necessity for investigation or change, and then would proceed to pursue his duties under the Act and reach such conclusion as he might find justified by the investigation, and proclaim the same."[130] Again, in upholding the delegation, the Court assumed the President had a duty to engage in relevant fact gathering and deliberation to reach "such conclusion as he might find justified by the investigation."[131] Importantly, the statute did not require the President to make such investigations at any particular time, but the Court nonetheless viewed the President as under an implied duty to gather information to determine whether the authority should be exercised.

This requirement is also supported by *Panama Refining Co. v. Ryan*, where the Court invalidated a delegation to ban transport of so-called "hot oil" precisely because there were no conditions for the President to ascertain before exercising the power.[132] In other words, because there was nothing for the President to inquire into and make a considered judgment about before exercising power, the delegation was unconstitutional.

Justice Cardozo dissented, but not because he did not think such a duty existed. To the contrary, Cardozo believed the statute contained a condition the President had to find before exercising power. Cardozo thus viewed the delegation as constitutional precisely because the President's power was contingent on gathering relevant information and making a considered judgment: "What [the President] does is *to inquire into the industrial facts as they exist from time to* time . . . . He is to study the facts *objectively*, the violation of a standard impelling him to action or inaction according to its observed effect upon [the

129. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 401 (1928).

130. *Id.* at 405.

131. *Id.*

132. Pan. Refin. Co. v. Ryan, 293 U.S. 388, 431–32 (1935) ("To hold that he is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.").

ultimate goal of] industrial recovery."[133] In Cardozo's estimation, because the law required the President to find certain conditions before exercising power, Congress had imposed "a mandate to inquire and determine whether the conditions in that particular industry were such at any given time as to make restriction helpful to the declared objectives of the act."[134] In short, Justice Cardozo assumed that because the President had to find a condition to exercise power, he had a duty of *inquiry* and *objectivity* in gathering information and making the relevant finding. "[T]he law presumes that the declaration [by the President would be] preceded by due inquiry and that it was rooted in sufficient grounds."[135] Again, for the President to exercise power, he had to first gather relevant information and then make a considered judgment based on such information.

These cases are all famous, but they are not unique. The Court has frequently upheld delegations to the President precisely because it viewed the President as under an implied duty to gather relevant information about conditions triggering power and make a reasonable judgment based on such information.[136] The nondelegation doctrine

133. *Id.* at 437–38 (Cardozo, J., dissenting) (emphasis added); *id.* at 438 ("[Congress] laid upon [the President] a mandate to inquire and determine whether the conditions in that particular industry were such at any given time as to make restriction helpful to the declared objectives of the act and to the ultimate attainment of industrial recovery."); *id.* at 437 ("All that Congress could safely do was to declare the act to be done and the policies to be promoted, leaving to the delegate of its power the ascertainment of the shifting facts that would determine the relation between the doing of the act and the attainment of the stated ends. That is what it did. It said to the President in substance: You are *to consider* whether the transportation of oil in excess of the statutory quotas is offensive to one or more of the policies enumerated . . . . If [so] . . . you may then by a prohibitory order eradicate the mischief." (emphasis added)).

134. *Id.* at 438.

135. *Id.* at 444.

136. *See* Hirabayashi v. United States, 320 U.S. 81, 104 (1943) ("The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government."); Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Lab., 312 U.S. 126, 145 (1941) ("Th[e] essentials [of the legislative function] are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."); United States v. Chem. Found., Inc., 272 U.S. 1, 12 (1926) ("It was peculiarly within the province of the Commander-in-Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. The determination of the terms of sales of enemy properties *in the light of facts and conditions from time to time arising in the progress of war* was not the making of a law; it was the application of the general rule laid down by the Act." (emphasis added)); Dep't of Transp. v. Ass'n Am. R.R.s., 575 U.S. 43, 81 (2015) (Thomas, J., concurring) ("Congress had created a 'named contingency,' in *Field v. Clark*, 'and the President was the mere agent of the law-

is thus built on a premise of the existence of a duty to deliberate. After all, if the President could exercise power completely arbitrarily—on a whim—then the doctrine would be pointless: the conditions the President must find would be rendered meaningless.[137] The President would then be able to exercise power based on her own will, rather than that of Congress—the precise opposite of the purpose of the nondelegation doctrine.[138]

Of course, the nondelegation doctrine today has been described as "toothless."[139] But the reason the nondelegation doctrine has fallen into disuse (for now)[140] is not because the Court has decided that conditions the executive must find satisfied can be found arbitrarily, but rather because it concluded that Congress could give executive branch actors broad leeway in identifying what precise conditions have to be satisfied. And if, as some suspect, a more robust nondelegation doctrine is revived by the current majority on the Supreme Court, the proposed new formulations of the test on offer would even more obviously require deliberation. There may now be a majority on the Court willing to overturn the prevailing "intelligible principle" test in favor of one permitting only grants of authority to conduct "executive fact-finding" or to "fill up the details" of legislation.[141] If the Court were to adopt this narrower formulation of the test this would even more obviously assume the President must gather relevant information and make a considered judgment before exercising power. It makes no

making department to ascertain and declare the event upon which its expressed will was to take effect.'" (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 410–11 (1928))); *cf.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541 (1935) (holding that unlike permissible delegations, the unconstitutional statute at issue "does not . . . prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure").

137. *See Pan. Refin. Co.*, 293 U.S. at 439 (Cardozo, J., dissenting) ("Either the statute means that the President is to adhere to the declared policy of Congress, or it means that he is to exercise a merely arbitrary will. The one construction invigorates the act; the other saps its life. A choice between them is not hard.").

138. *See Schechter Poultry*, 295 U.S. at 537–38 ("Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable . . . .").

139. *See, e.g.*, Kathryn A. Watts, *Rulemaking as Legislating*, 103 GEO. L.J. 1003, 1016 (2015).

140. There may now be a majority on the Court willing to overturn the prevailing "intelligible principle" test in favor of one permitting only grants of authority to conduct "executive fact-finding," to "fill up the details" of legislation, or where the President already has inherent constitutional authority. *See* Gundy v. United States, 139 S. Ct. 2116, 2136–37 (2019) (Gorsuch, J., dissenting).

141. *See id.* Justice Gorsuch also argues delegations would be permissible where the President already has inherent authority. *Id.*

sense to limit delegations to such contexts if one assumes the delegate can arbitrarily find whatever facts or fill in whatever details she wishes without engaging in any deliberation. In any event, while the Court has not struck down a statute on nondelegation grounds since 1935, even the Court's phrasing of the prevailing intelligible principle test is illustrative.[142] To apply a principle that is "intelligible," one must consider and decipher it—one must deliberate.

In short, a review of the Court's nondelegation case law reveals that the Court has long assumed that if the President must find a condition to exercise power, she must gather relevant information and make a considered judgment before concluding the condition has been satisfied.

2. Deference to the President's Information and Judgment

A host of well-known Supreme Courts cases deferring to presidential exercises of judgment also support this duty. In these cases, the Court defers because it assumes the President possesses the ability to gather and assess information in a manner superior to that of the Court or Congress. These cases necessarily assume that the President will *utilize* these informational and judgmental advantages in exercising the relevant power.

The Court's decision in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.* is illustrative.[143] There, the Court found it could not review the President's disagreement with a Civil Aeronautics Board's recommendation that it would serve the public interest to deny a certificate authorizing an air route to a particular company.[144] The relevant statute gave the President "unconditional" authority to approve, disapprove, or modify the Board's recommendation.[145] In deferring to the President, the Court noted that

> [t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken *on information properly held secret*. . . . But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such 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 decisions of a kind for which the Judiciary has neither

142. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

143. 333 U.S. 103 (1948).

144. *Id.* at 105–06.

145. *Id.* at 106.

> 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.[146]

Here, the Court made clear that its deference was based upon a belief that the President had access to better *information* and that he would make a "delicate" and "complex" decision involving "large elements of prophecy."[147] Clearly the Court assumed the President would gather relevant information and make a considered judgment based on it.

This conception is also supported by *United States v. Curtiss-Wright Export Corp.*, where the Court deferred to the President's finding that the prohibition of the sale of certain arms to Bolivia and Paraguay "may contribute to the reestablishment of peace between those countries."[148] The Court premised its deference on the notion that the President "has the better opportunity of knowing the conditions which prevail in foreign countries . . . [including through] his confidential sources of information."[149] It ultimately concluded that "there is sufficient warrant for the broad discretion vested in the President *to determine* whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries."[150] Of course, the Court was envisioning that such a "determin[ation]" would be made upon the confidential information and sources it had viewed itself as bound not to reveal.[151]

This notion is also present in *United States v. George S. Bush & Co.*, where the Court held that it could not second-guess the President's determination that a rate of duty recommended by a trade

146. *Id.* at 111 (emphasis added).

147. *Id.*; *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) ("First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because '[t]hey are delicate, complex, and involve large elements of prophecy.'" (quoting *Waterman S.S. Corp.*, 333 U.S. at 111)).

148. 299 U.S. 304, 330 (1936).

149. *Id.* at 320; *see also id.* at 321 ("When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind . . . [that] the President's action . . . may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive . . . .").

150. *Id.* at 329 (emphasis added).

151. *Id.* at 319; *id.* at 320 ("Secrecy in respect of information gathered by [the President's confidential sources of information] may be highly necessary, and the premature disclosure of it productive of harmful results.").

commission would "equalize the differences in the domestic and foreign costs of production" of canned clams.[152] The Court found that

> the *judgment* of the President that *on the facts, adduced in pursuance of the procedure prescribed by Congress*, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the *judgment of the officer as to the existence of the facts calling for that action* is not subject to review.[153]

Once again, the Court was deferring, precisely because it did not want to displace the considered "judgment" of the President based on the gathered facts.

3. Presumption of Regularity

The Court's cases on the presumption of regularity also support the notion that the President is obligated to gather relevant information and make a considered judgment based on that information. In *Martin v. Mott*, the Court explained that it would defer to the President's finding that there was an "imminent danger of invasion" such that he could call forth a militia, because "the evidence upon which the President might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest . . . might imperiously demand to be kept in concealment."[154] The Court noted the President "is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts."[155] The Court thus envisioned the President gathering relevant information and making a considered judgment on it.[156] As Justice Cardozo later put it in describing this presumption, "[t]he will to act being declared, the law presumes that the declaration was preceded by due inquiry and that it was rooted in sufficient grounds."[157] Again, the Court premised its decision to defer on the assumption that the President would

152. 310 U.S. 371, 379 (1940).

153. *Id.* at 379–80 (emphasis added).

154. 25 U.S. 19, 31 (1827).

155. *Id.*

156. *See id.* at 32–33 ("When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law.").

157. Pan. Refin. Co. v. Ryan, 293 U.S. 388, 444 (1935) (Cardozo, J., dissenting); *id.* at 445–46 ("When the President exercises an authority confided to him by law, the presumption is, that it is exercised in pursuance of law.").

gather relevant information and make a considered judgment based upon it.

4. Executive Privilege

The Court's executive privilege cases also provide strong support for the duty of deliberation. Thus, while executive privilege has traditionally been used to block access to the contents of presidential deliberation, its very logic is that such deliberation is necessary for the President to exercise her powers.

In *Nixon v. Administrator of General Services*, the Court stated—in agreement with the Solicitor General—that executive "privilege is necessary to provide the confidentiality required for the President's conduct of office. Unless he can give his advisers some assurance of confidentiality, a *President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends*."[158] One only has to turn this phrasing around to see that to "effective[ly] discharge . . . his duties," the President must "receive the full and frank submissions of facts and opinions" within the executive branch. This is a recognition that, for the President to exercise her power, she *must* gather relevant information and make an informed judgment based on it. Otherwise, protecting this interest as "necessary" for governance does not make sense.[159]

Indeed, as Justice Rehnquist put it in dissent, "[g]iven the vast spectrum of the decisions that confront him . . . it *is by no means an overstatement to conclude that current, accurate, and absolutely candid information is essential to the proper performance of his office*,"[160] and that "[u]nless he can give his advisers some assurance of confidentiality, a President could not expect to receive the full and frank submission of facts and opinions *upon which effective discharge of his duties depends*."[161] Justice Rehnquist thus also viewed the President's gathering of information and making a considered judgment upon it as necessary or, as he separately put it, "an absolute prerequisite" to the "effective discharge of [the President's] duties."[162]

158. 433 U.S. 425, 448–49 (1977) (emphasis added).

159. *See id.* at 501; *see also* Trump v. Mazars USA, LLP, No. 19-715, slip op. at 13 (U.S. July 9, 2020) ("[Executive] privilege safeguards the public interest in candid, confidential deliberation within the Executive Branch; it is 'fundamental to the operation of Government.'" (quoting United States v. Nixon, 418 U.S. 683, 708 (1974))).

160. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 551–52 (1977) (Rehnquist, J., dissenting) (emphasis added).

161. *See id.* at 551–52, 558 (emphasis added).

162. *See id.* at 546–47 ("[C]andid and open discourse among the President, his advisers, foreign heads of state and ambassadors, Members of Congress, and the others

The Court also acknowledged the necessity of such internal deliberation in *United States v. Nixon*, noting "[t]he President's *need* for complete candor and objectivity from advisers"[163] and "the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking."[164] As the Court summed it up, executive privilege serves "the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion."[165]

In short, the existence of executive privilege is justified on the notion that the President must gather information and deliberate to exercise her duties. While these statements are not facially incompatible with the notion that such deliberation is required in some instances but not necessarily in others, the thrust of the decisions—and the reason the Court deemed such a privilege as constitutionally based—appears to be the assumption that for the President to exercise her duties effectively and lawfully, she must engage in deliberation.

5. Veto Power

The duty to deliberate is also supported by the Court's discussion of the President's constitutional power to veto legislation in the *Pocket Veto Case*.[166] In that case, the Court found that "[t]he faithful and effective exercise of this momentous duty [to veto legislation] necessarily requires time in which the President may carefully examine and consider a bill and determine, *after due deliberation*, whether he should approve or disapprove it."[167]

> [I]t is just as essential a part of the constitutional provisions, guarding against ill-considered and unwise legislation, that the President, on his part, should have the full time allowed him for determining whether he should approve or disapprove a bill, and if disapproved, for adequately formulating the objections that should be considered by Congress, as it is that Congress, on its part, should have an opportunity to re-pass the bill over his objections.[168]

who deal with the White House on a sensitive basis is an absolute prerequisite to the effective discharge of the duties of that high office.").

163. 418 U.S. 683, 706 (1974) (emphasis added).

164. *Id.* at 708.

165. *Id.* at 705–06.

166. 279 U.S. 655 (1929).

167. *Id.* at 677 (emphasis added).

168. *Id.* at 678.

In short, although the constitutional text does not state explicitly that the President's decision to sign a bill or not requires deliberation,[169] the Court found that such a decision could only be made "after due deliberation."[170]

6. *Trump v. Hawaii*

This brings us to the latest example of the Court examining whether the President satisfactorily exercised power. In *Trump v. Hawaii*, the Court considered whether President Trump had adequately made the predicate finding to exercise power in the so-called Travel Ban that the entry of certain classes of aliens would be "detrimental to the interests of the United States."[171] In concluding the President had satisfied his obligation to make the relevant finding, the Court went out of its way to detail and emphasize the "worldwide, multi-agency review" that preceded the ban.[172] In short, the Court upheld the exercise of power precisely because it believed the President's claim that he had gathered relevant information and made a considered judgment based on it.

It is worth quoting the opinion to see how the Court viewed the President's exercise of power as lawful precisely because of the deliberation that preceded it:

169. *See* U.S. CONST. art I, § 7 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.").

170. *See also Pocket Veto Case*, 279 U.S. at 678 (noting how the President might need "sufficient time in which to complete his consideration"); La Abra Silver Mining Co. v. United States, 175 U.S. 423, 455 (1899) (noting that time given to the President after Presentment is "for an examination of its provisions").

171. Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018) (quoting 8 U.S.C. § 1182(f)).

172. *Id.* at 2408 ("The President lawfully exercised [the delegated] discretion based on his findings—following a worldwide, multi-agency review—that entry of the covered aliens would be detrimental to the national interest."). President Trump issued the first version of the Travel Ban in his first week in office, reportedly without standard interagency review. *See* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 829–30 (2018). After that order was enjoined by lower courts, the President replaced it with a new order, which barred entry from six countries for ninety days while a "worldwide review" would be conducted relating to "the adequacy of information provided by foreign governments about their nationals seeking to enter the United States." *Trump*, 138 S. Ct. at 2403–04. After that order was also partially enjoined, the President "complet[ed] the worldwide review" and issued a third version of the ban, which was reviewed by the Court. *Id.* at 2404.

> The sole prerequisite set forth in § 1182(f) is that the President "find[]" that the entry of the covered aliens "would be detrimental to the interests of the United States." The President has undoubtedly fulfilled that requirement here. *He first ordered DHS and other agencies to conduct a comprehensive evaluation* of every single country's compliance with the information and risk assessment baseline. The President then issued a Proclamation setting forth extensive findings describing how deficiencies in the practices of select foreign governments . . . deprive the Government of "sufficient information to assess the risks [those countries' nationals] pose to the United States." *Based on that review*, the President found that it was in the national interest to restrict entry of aliens who could not be vetted with adequate information—both to protect national security and public safety, and to induce improvement by their home countries. The Proclamation therefore "craft[ed] . . . country-specific restrictions that would be most likely to encourage cooperation given each country's distinct circumstances," while securing the Nation "until such time as improvements occur."[173]

The Court thus upheld the finding because it viewed the President's determination as relying on, first, gathering information and, then, issuing an order "based on" and "crafted" in light of the information found. In other words, the Court viewed the President as having gathered information and made a considered judgment "based on" that information, i.e., that the President had deliberated. Indeed, the Court went out of its way to emphasize the President's deliberation by referencing repeatedly that the President had conducted a "worldwide" interagency review before making the relevant determination.[174] In short, the Court appeared to find the President had validly exercised the power *precisely because* the President had done so after gathering information and making a considered judgment based on it.

Although the Court's review of the Establishment Clause challenge later in the opinion raises distinct issues from the question of what the President's baseline procedural duties are in exercising power, that part of the opinion repeats some of the standard deference considerations mentioned above. The Court stated: "Because decisions in these matters may . . . involve 'classifications defined in the light of changing political and economic circumstances,' such *judgments* 'are frequently of a character more appropriate to either the Legislature or the Executive,'"[175] and "'when it comes to *collecting evidence* and *drawing inferences*' on questions of national security, 'the

173. *Trump*, 138 S. Ct. at 2408–09 (emphasis added) (first quoting 8 U.S.C. § 1182(f); then quoting Proclamation 9723, 83 Fed. Reg. 15,937 (Apr. 10, 2018)).

174. *See, e.g.*, *id.* at 2404–05 ("After consulting with multiple Cabinet members and other officials, the President adopted the Acting Secretary [of Homeland Security's] recommendations and issued the Proclamation."); *id.* at 2408, 2412, 2417 (emphasizing "the multi-agency review process").

175. *Id.* at 2418–19 (emphasis added) (quoting Mathews v. Diaz, 426 U.S. 67, 81 (1976)).

lack of competence on the part of the courts is marked.'"[176] The Court further noted: "'Any rule of constitutional law that would inhibit the flexibility' of the President '*to respond to changing world conditions* should be adopted only with the greatest caution . . .'"[177] and that "we cannot substitute our own assessment for the Executive's *predictive judgments* on such matters, all of which 'are delicate, complex, and involve large elements of prophecy.' . . . [T]he *Executive's evaluation of the underlying facts* is entitled to appropriate weight."[178]

Here, once again, the Court envisioned the President as under a duty to "collect[] evidence and draw[] inferences" before exercising power.[179] Its deference was premised on a view that it needed to give the President flexibility to "respond" to "changing world conditions" and to defer to the President's greater skill in making "predictive judgments" based on an "evaluation of the underlying facts." These statements would not make sense if the President was not required to gather information and make a considered judgment based on such "underlying facts."

For all its flaws, *Trump v. Hawaii* reinforces the duty to deliberate by combining some of the points made above. It approved the President's exercise of power under a delegation requiring only that he "find" entry "detrimental to the interests of the United States" as justified precisely because the President engaged in a "worldwide" interagency process of information gathering and internal executive branch deliberation before making the relevant finding. It then deferred to the President's substantive decision because it assumed the President was better positioned to gather the requisite information and make a considered judgment on it.

7. Sum and Critiques

Canvassing Supreme Court cases assessing the President's exercise of power reveals that the Court has long viewed the President as obligated to gather relevant information and make a considered judgment based on it before exercising power delegated directly to her.

One potential counterargument to the identification of this duty is that these cases merely typify a descriptive assumption about what the President is *likely to do* or *ought to do*, rather than what the

176. *Id.* at 2419 (emphasis added) (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 34 (2010)).

177. *Id.* at 2419–20 (emphasis added) (quoting *Mathews*, 426 U.S. at 81–82).

178. *Id.* at 2421–22 (emphasis added) (quoting Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948)).

179. *Id.* at 2419 (quoting *Holder*, 561 U.S. at 34).

President *must do* to exercise power lawfully. In other words, the argument runs that the cases might describe the President's deliberation as satisfying a condition that is *sufficient* to lawfully exercise power but not *necessary*. In my view, this position is not reconcilable with these cases for at least three reasons.

First, the nondelegation cases do not operate on the register of discussing a merely sufficient, rather than necessary, condition. In many of these cases, the reason the delegations were held constitutional was precisely because the President had to find certain conditions that the Court assumed could only be found upon deliberation. It seems implausible to read the cases as suggesting that the Court would have upheld the delegations if the President had argued that he could or did find these conditions—which again were necessary features of upholding the delegations—satisfied arbitrarily, without gathering any information or making a considered judgment.[180] In other words, the President's deliberation in finding the condition was a necessary feature of upholding the delegations—if the President could find the conditions arbitrarily, the conditions that made the legislation constitutional would not actually limit the delegation at all and the delegations would have been held to be unconstitutional.

Second, the remaining areas of doctrine primarily include deference and privilege doctrines that exist precisely because the Court believed the President must deliberate in order to validly exercise power and that such deliberation must be protected. These deference and privilege doctrines presuppose that the President will engage in deliberation before exercising a power granted to her by statute or the Constitution. For example, the national security deference and presumption of regularity doctrines' *raison d'etre* is the belief that the President has superior ability to gather information and make a

180. *Cf.* Pan. Refin. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting) ("Either the statute means that the President is to adhere to the declared policy of Congress, or it means that he is to exercise a merely arbitrary will. The one construction invigorates the act; the other saps its life. A choice between them is not hard."); *id.* at 448 ("If legislative power is delegated subject to a condition, it is a requirement of constitutional government that the condition be fulfilled. In default of such fulfillment, there is in truth no delegation, and hence no official action, but only the vain show of it."). After all, concluding that the President can find these conditions arbitrarily would effectively be a finding that there are no such conditions. *Cf.* JAFFE, *supra* note 33, at 595 ("The 'law' does not operate in a vacuum. The application of law requires a factual predicate; an action without such a predicate is lawless. A finding of fact which is based on no more than the will or desire of the administrator is lawless in substance if not in form."); *see also* Steilen, *supra* note 32, at 513 ("If there is no power in government to act arbitrarily, then there can be no authority in the legislature to delegate arbitrary power.").

considered judgment based on it that courts cannot competently evaluate. Such deference or presumptions naturally would not apply if the President had conceded that he had not gathered any information or made any considered judgment before exercising the relevant power. If that were so, the Court could easily evaluate the exercise of power—the President's institutional advantages would be absent and there would be no need for such deference doctrines. Similarly, the purpose of executive privilege is to protect the President's ability to deliberate.[181] If the President conceded no deliberation had occurred—that he did not, in fact, gather any information or that he did not make a considered judgment at all—the privilege would not attach.[182] There would be no information to protect.

Even beyond a lack of deliberation eliminating application of these doctrines in any particular instance, the very existence of these deference and privilege doctrines supports the notion that the President must deliberate before exercising power delegated to her. Again, this is the presupposition for why these doctrines are seen as necessary. It seems unlikely that the Court would have created these deference and privilege doctrines to protect presidential deliberation if it viewed such deliberation as a laudatory but ultimately optional feature of presidential decisionmaking, rather than a necessary one.[183] It is true these cases do not explicitly address—likely because no one would have thought to argue—whether the President can exercise power without deliberating at all, but it seems hard to believe the Court would have crafted these doctrines in the way it did if the President could exercise power without engaging in any deliberation.

Finally, at a bare minimum, the cases discussed above show that in a wide range of cases the Court has made a descriptive assumption about how the President exercises power—that before doing so she deliberates by gathering relevant information and then makes a considered judgment based on that information. To conclude that the President has no duty to deliberate is not only to find that this descriptive assumption was wrong, but also that it was irrelevant to the outcome of all these cases. That seems much less likely than the alternative. It is true that one can never truly know what the Court would

181. *See supra* notes 157–58 and accompanying text.

182. The privilege might attach outside of the deliberative process if there were some law enforcement, attorney-client communication, or perhaps classified information present. But if there is no information gathering or considered judgment, it is unlikely it could contain attorney-client communication or classified information.

183. And, indeed, in the privilege context, the Court repeatedly described such deliberation as *necessary* to exercise the powers given to the President, rather than merely normatively desirable. *See, e.g.*, *supra* note 163 and accompanying text.

have done if the President had told the Court that this assumption was false—that, in fact, the President could and did find the relevant conditions rendering the delegations constitutional without any deliberation at all; that deference was required even though the President's national security decisions need not be and were not based on any information or consideration at all; that regularity should be presumed even though there was no regular process; that the President has constitutional authority to withhold information even though divulging it would not reveal any deliberation; that the President's finding that the entry of certain classes of aliens would be "detrimental to the interests of the United States" was lawfully made on a whim with no information at all, let alone following a "worldwide, multi-agency review." But it seems far more likely that if the Court discovered that this assumption was false, this discovery would have mattered to the outcomes of the cases rather than it being irrelevant. In other words, the assumption seems like more than mere window-dressing in the opinions irrelevant to the Court's ultimate decision.

It is much more straightforward to believe that the Court's consistent belief about how the President operated, present across a range of cases spanning more than a century, reflected how it thought the President must act to exercise power lawfully—i.e., that the President must deliberate before exercising power. The fact that the Court never spelled this out explicitly is likely reflective of the fact that no one would have thought to argue that the President could simply exercise these powers arbitrarily, rather than that such arbitrary exercises of power are permissible.

Although the Court has not yet made the duty to deliberate explicit or shown itself willing to robustly police the President's compliance with it, the best reading of its cases shows that the Court has long assumed the President is obligated to gather relevant information and make a considered judgment on that information before exercising power. The President must deliberate before exercising power.

C. EXECUTIVE BRANCH INTERPRETATION

A duty to gather information and make a considered judgment based upon such information is perhaps even more obviously present in executive branch legal advice dating to the early days of the Republic. This Section looks to the history of Attorney General and modern Office of Legal Counsel (OLC) opinions to evaluate how they have construed the President's procedural duties in exercising power. It turns out that a long history of Attorney General and OLC opinions supports the notion that when the President is delegated power contingent on

making some sort of factual or policy determination, she has a duty to gather information and make a considered judgment based on that information in making the determination.

Of course, such executive branch practice is not conclusive of constitutionality.[184] But given that the President's legal advisers have historically been protective of presidential power and wary of imposing burdens on it, if they have assumed the President is under a duty to deliberate, then we ought not to lightly disregard such an assumption. In addition, establishing the long pedigree of this duty might assuage concerns that identifying the duty now would be novel and overly burdensome. To the contrary, such a duty seems to have been accepted since at least the early nineteenth century.

For example, in 1823, the Attorney General advised the President that if an official under the President's command had made a "corrupt appointment," the President would be "constitutionally bound to look to the case" in order to abide by the duty to "take care that the laws be faithfully executed," and, if corruption had taken place, to punish the official for the violation.[185] An 1831 opinion on the *Jewels of the Princess of Orange* made an analogous point stating the President had a duty to look into potential malfeasance by his subordinates and, if found, take action to correct it.[186] In both instances, the Attorney General presumed a duty to gather relevant information and make a considered judgment upon it.[187]

In 1853, the Attorney General advised the President that before granting a pardon to someone prior to conviction, "there must be satisfactory evidence of some kind as to the guilt of the party," again suggesting the President had to gather information—i.e., "satisfactory evidence"—and act upon it.[188] And, in 1857, the Attorney General

184. *See generally* Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668 (2016) (cautioning against assuming that because a branch has acted a certain way that it has done so because it viewed such action as constitutional); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

185. President & Acct. Officers, 1 Op. Att'y Gen. 624, 626 (1823).

186. Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 489 (1831) ("[U]pon the President being satisfied that the forms of law were abused for such a purpose, and being bound to take care that the law was faithfully executed, it would become his duty to take measures to correct the procedure.").

187. *See* Death Warrants, 2 Op. Att'y Gen. 344, 344–45 (1830) (noting that decision to leave execution of sentences to courts was made by the President "after mature deliberation").

188. Pardoning Power of the President, 6 Op. Att'y Gen. 20, 21 (1853) (stating that prosecutor should "be required to communicate any facts, which . . . may contribute to inform the conscience of the President in the premises"); *see also* Off. & Duties of Att'y

described the President's role in appointing someone to a particular office,

> [T]he fitness or unfitness of persons for a particular appointment to office . . . depends, or can or may depend, on a mass of facts, covering more or less of time, and constituting the history of the person. These facts it *is the duty of the President, in all cases of nomination to office, to determine as he best may, by personal or by communicated knowledge*.[189]

The Attorney General thus clearly conceived of the President as having a duty to gather information and make a considered judgment based upon it in order to exercise the President's appointment authority.

In keeping with this conception, in 1856, the Attorney General concluded the President could not send federal military aid to the governor of California to suppress an insurrection because the statute permitting such aid was limited to instances where the state legislature could not be convened, which was not the case then.[190] In doing so, the Attorney General noted "[i]t is obvious that the President of the United States must himself determine the conditions of actual or apprehended insurrection in a State, demanding and justifying the interposition of the military force of the United States."[191] Again, here, the Attorney General viewed the President as bound to gather relevant information and make a considered judgment based on such information before exercising power.

A few years later, in 1860, the Attorney General again assumed the President had to gather information and make a considered judgment before invoking statutory power in concluding that before the President could call forth the militia pursuant to a finding that the laws of the United States could not be enforced by ordinary judicial proceedings, their "incapacity to cope with the power opposed to them shall be plainly demonstrated," stating that "[i]t is only upon clear evidence to that effect that a military force can be called into the field."[192]

Gen., 6 Op. Att'y Gen. 326, 350 (1854) ("The conscientious determination of [whether to grant pardons] requires, generally, the investigation of proceedings in court, and that of questions of law as well as of evidence . . . .").

189. Navy Efficiency Acts, 8 Op. Att'y Gen. 335, 351 (1857) (emphasis added).

190. Insurrection in a State, 8 Op. Att'y Gen. 8, 13 (1856).

191. *Id.* at 15; *see also id.* ("[W]ithout presuming to say that there may not be in the present case some act of moral authority competent for you in your discretion to perform, still, in my opinion, the circumstances do not afford sufficient legal justification for acceding to the actual requests of the Governor of the State of California.").

192. Power of the President in Executing the L., 9 Op. Att'y Gen. 516, 522 (1860).

Similarly, in 1874, when two people claiming to be governor of Arkansas asked the President for federal assistance to combat "domestic Violence" pursuant to the Guarantee Clause,[193] the Attorney General stated that "where two persons, each claiming to be governor, make calls respectively upon the President, under said clause of the Constitution, it of course becomes necessary for him to determine in the first place which of said persons is the constitutional governor of the State."[194] The Attorney General thus envisioned the President as gathering relevant information about who was the rightful governor and making a considered judgment upon that information before exercising power.

In 1881, the Attorney General opined on a presidential authority permitting the President to "drop from the rolls of the Army, for desertion, any officer who is now . . . absent from duty three months without leave."[195] "To exercise such power," the Attorney General stated,

> the President must necessarily first ascertain to his own satisfaction what officers are "now" so absent. . . . The law placed its ascertainment wholly in the hands of the Chief Executive, who must naturally have been expected to resort to the official records of the War Department as one source, at least, of information.[196]

Again the Attorney General believed the President had a duty to gather information, here, to conduct an investigation into military records, and make a considered judgment based on such investigation before making the relevant determination.

Similarly, in an 1892 opinion regarding the President's authority to award medals of honor to officers and privates who "have most distinguished . . . themselves in action" the Attorney General noted that Congress "proceeded on the idea that the evidence which would chiefly, if not exclusively, guide the judgment of the President in awarding 'medals of honor' would be the official reports of battles made to the War Department."[197] Again, the premise was that the

193. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

194. Governorship of Ark.—Case of Baxter & Brooks, 14 Op. Att'y Gen. 391, 394 (1874).

195. Case of Walker A. Newton, 17 Op. Att'y Gen. 13, 15 (1881) (emphasis omitted).

196. *Id.* (emphasis added); *see also id.* at 18 ("It was left to the President to ascertain and determine who ought to be dropped, and then to govern himself accordingly. . . . [T]he means of discovering the facts was left to the sound judgment of him upon whom was conferred the power to act.").

197. Medal of Honor, 20 Op. Att'y Gen. 421, 421–22 (1892).

President would gather information and act based on the evidence he found.

In an opinion in 1910, the Attorney General stated that before the President could determine that a foreign country had "unduly discriminate[d] against the United States," thereby triggering authority to impose a tariff regime,

> Clearly . . . the President should consider not only [the intricate provisions of the relevant German law,] but also their bearing upon the commercial conditions existing between the citizens of this country and the owners of potash mines in Germany, and ascertain therefrom whether this provision of the German law must *and does in fact* work a discrimination against the United States.[198]

The Attorney General added that in making the determination the "President should consider all the attendant facts and circumstances."[199] Again, the Attorney General assumed the President had a duty to gather and consider relevant information before making the determination. This view was supported by numerous other opinions of that era.[200]

And this view persisted. In 1964, after calls by civil rights groups and members of Congress to use federal personnel to prevent further violence against civil rights workers in Mississippi, Deputy Attorney General Nicolas Katzenbach addressed whether the President had statutory authority to use military force premised on making a determination that doing so was necessary to enforce federal law.[201] Katzenbach concluded that although "[t]here is, of course, considerable information available that could be used to support" the claim that there had been a complete breakdown of state law enforcement as a result of Klan activity in Mississippi, "in view of the extreme seriousness of the use of those [authorities], . . . the government should have more evidence than it presently has of the inability of state and local

198. Potash Mined in Ger.—Antitrust L.—Discriminatory Exp. Duty, 31 Op. Att'y Gen. 545, 556–57 (1910) (emphasis added).

199. *Id.* at 546.

200. *See, e.g.*, Tariff Comm'n—Investigation in Respect to Duty on Logs of Fir, Spruce, Etc., 34 Op. Att'y Gen. 77, 80 (1924) ("As to such importations, therefore, it is not only within the power but it becomes the duty of the President to ascertain whether there is any difference between the foreign and domestic cost of production which may not be equalized by the duty as fixed."); Spanish Ry. Concessions—Phil., 23 Op. Att'y Gen. 181, 195 (1900) ("[T]he President has authority, if he thinks it necessary, to apply the local revenues of the provinces through which this road extends to the discharge of their equitable liability, based upon so much of the concessionary agreement as has been already executed, the amount of which liability he has authority to determine, *in view of all the facts and circumstances*." (emphasis added)).

201. *See* Use of Marshals, Troops, & Other Fed. Pers. for L. Enf't in Miss., 1 Supp. Op. O.L.C. 493, 493 (1964).

officials to maintain law and order—as a matter of wisdom as well as of law."[202] Katzenbach thus suggested the President had a duty to gather information—indeed more information than the President possessed—and make a considered judgment on it before making the relevant determination.

More recent opinions by the Office of Legal Counsel also support this duty. Like the Supreme Court, OLC has recognized a constitutionally based executive privilege doctrine, based on the idea that the confidentiality the privilege provides "protects . . . the candid advice that the Supreme Court has acknowledged is essential to presidential decision-making," and without which "a President could not expect to receive the full and frank submissions of facts and opinions upon which effective discharge of his duties depends."[203]

The duty is present in numerous other contexts as well. For example, in discussing the President's voluminous powers upon declaring a "severe energy supply interruption," OLC stated that "the available statutory authorities generally provide the President with broad discretion to determine if, when, and how they should be exercised, taking into account the facts of any future energy emergency and the President's best judgment as to how to prevent or deal with the emergency situation."[204] Again, OLC assumed the President's determination would be based on the "facts" of the relevant emergency and the President's "best judgment" as to how to deal with it.[205]

In 1995, OLC considered whether the President had a duty to impose sanctions on certain individuals upon finding they had "knowingly and materially contributed" to a chemical weapons program of

202. *Id.* at 498.

203. Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *2 (O.L.C. May 20, 2019); Immunity of the Assistant to the President & Dir. of the Off. of Pol. Strategy & Outreach from Cong. Subpoena, 2014 WL 10788678, at *3 (O.L.C. July 15, 2014) ("[E]xecutive branch confidentiality . . . is necessary (among other things) to ensure that the President can obtain the type of sound and candid advice that is essential to the effective discharge of his constitutional duties.").

204. Legal Auths. Available to the President To Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petrol. Prods., 6 Op. O.L.C. 644, 649 (1982).

205. *See also* Cong. Disapproval of AWACS Arms Sale, 5 Op. O.L.C. 308, 316–17 (1981) (holding the President could "initiate procedures under the emergency exception to the congressional review provision . . . *if in his considered discretion such a judgment is possible*" (emphasis added)).

certain countries.[206] OLC concluded "the President has a duty to make the determinations specified in the statute if he is presented with sufficient evidence to compel [the relevant] conclusion."[207] Here, OLC cast the President in the role envisioned by *J.W. Hampton*, one of the nondelegation cases mentioned above:

> When [Congress] delegates the power, and prescribes the duty, to make . . . determinations [of when a triggering condition has been satisfied], the President may be considered "the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." We believe that [the relevant section] casts the President in such a role, and requires him to make a determination if the facts available to him establish that the conditions described in the statute exist.[208]

Again, OLC conceived of the President as bound to make the relevant determination based on the evidence before him—he had to deliberate before exercising power.

Most recently, even the extremely executive-power friendly OLC under the Trump administration has supported the duty to gather information and make a considered judgment upon it. For example, with respect to the President's use of military force in Syria, OLC stated "[w]e would not expect that any President would use [the] power [of the armed forces] without a substantial basis for believing that a proposed operation is necessary to advance important interests of the Nation."[209] And, regarding releasing records relating to John F. Kennedy's assassination, OLC noted that, if the President did not make group-level decisions about what should be released, he "would be forced to evaluate the individual justifications for postponing tens of thousands of records on a compressed timetable without adequate time for full consideration," again suggesting that the President has a duty to gather and make a considered judgment before exercising power.[210] Even OLC's opinion concluding that the Secretary of Treasury need not hand over President Trump's tax returns despite a statutory requirement that such returns "shall [be] furnish[ed]" upon request by the House Ways and Means Committee Chair arguably

206. *See* Presidential Discretion To Delay Making Determinations Under the Chem. & Biological Weapons Control & Warfare Elimination Act of 1991, 19 Op. O.L.C. 306, 306–07 (1995).

207. *Id.* at 310.

208. *Id.* at 309 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 411 (1928)).

209. Apr. 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 2018 WL 2760027, at *7 (O.L.C. May 31, 2018).

210. Temp. Certification Under the President John F. Kennedy Assassination Recs. Collection Act of 1992, 2017 WL 9868940, at *6 (O.L.C. Oct. 26, 2017).

supports the duty.[211] In concluding that Treasury had authority to disregard the request because of the House's purported illegitimate legislative motive, OLC found that the Take Care Clause imposed a duty that "Treasury must determine, for itself, whether the Committee's stated reason reflects its true one or is merely a pretext."[212] Here, OLC was identifying a *duty* stemming from the Take Care Clause to make a considered judgment based on available information gathered by the executive.

In short, a long history of internal executive branch legal advice suggests the President has a duty to gather relevant information and make a considered judgment based on it before making predicate determinations that give the President power.

D. DOES THE DUTY APPLY TO CONSTITUTIONAL AUTHORITIES?

The duty established above clearly applies to the President's exercise of statutory powers, but what about powers originating in the President's *constitutional* authorities? Although some of the cases discussed above—particularly those involving the nondelegation doctrine—dealt with statutory authority, there is good reason to think the duty applies to constitutional authorities as well. First, if we take the term "Laws" in the Take Care Clause to include constitutional authorities—as it is typically, although not universally, understood—then the duty to be conscientious and execute the law without failure of performance applies to constitutional authorities.[213] And, in terms of Supreme Court precedent outside of the nondelegation space, although many of the cases discussed above related to statutory authorities, not all did. For example, the executive privilege cases are premised on the need for deliberation not only for statutory powers but also for constitutional ones, which is something that Justice Rehnquist took pains to emphasize.[214] The Court's discussion of the President's

211. Cong. Comm.'s Request for the President's Tax Returns Under 26 U.S.C. § 6103(f), 2019 WL 2563046, at *1, *22 (O.L.C. June 13, 2019).

212. *Id.* at *26.

213. *See, e.g.*, Bernick, *supra* note 18, at 33 (concluding "Laws" includes the Constitution); *cf.* Goldsmith & Manning, *supra* note 116, at 1855 (acknowledging debate over whether "Laws" includes the Constitution); Roisman, *supra* note 18, at 855 (same).

214. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 558 (1977) (Rehnquist, J., dissenting) (opining that the Act would "significantly hamper[] the President . . . in his ability to gather the necessary information to perform the countless discrete acts which are the prerogative of his office under Art. II of the Constitution"); *id.* at 551–52 ("Given the vast spectrum of the decisions that confront him—domestic affairs, relationships with foreign powers, direction of the military as Commander in Chief—it is by no means an overstatement to conclude that current, accurate, and absolutely candid

veto power as requiring "due deliberation" also applied to a constitutional, rather than statutory, power.[215] Similarly, deference to the President based on the ability to gather information and evaluate it applies to constitutional powers as well.[216] And, the logic of the presumption of regularity cases would not seem to be limited to findings required by statute rather than those required by the Constitution.[217]

Finally, the internal executive branch legal opinions discussed above frequently assumed the duty of deliberation applied to constitutional powers, not just statutory ones.[218] In short, the duty to deliberate does not seem specific to executing *statutory powers*, but it also appears to encompass exercising constitutional powers.

E. WHAT DOES THE DUTY ENTAIL?

Before explaining how the duty might best be enforced, it is worth addressing briefly what the duty to deliberate might entail in concrete terms. First, it is important to recognize that the duty is a *standard*. The duty to deliberate requires that if a power is contingent on finding a certain condition, the President must find that condition following reasonable deliberation—she must gather relevant information and make a considered judgment based on it. The amount of deliberation required will vary depending on the relevant authority. In theory, the information that is relevant could be very little, gathering it could simply require recalling it to mind, and making a considered judgment might require simply thinking it through. But, in many cases, much more deliberation will be required to be able to say that the President has gathered the *relevant* information and made a *considered* judgment.

information is essential to the proper performance of his office.").

215. *See* Pocket Veto Case, 279 U.S. 655, 677–78 (1929).

216. *Cf.* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (discussing need for secrecy for President "both as Commander-in-Chief and as the Nation's organ for foreign affairs"); United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319–21 (1936) (discussing President's constitutional foreign affairs authorities).

217. *See* Roisman, *supra* note 18, at 834–37 (listing constitutional authorities requiring factual findings).

218. *See, e.g.*, Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 489 (1831) (regarding Take Care Clause obligations); Pardoning Power of the President, 6 Op. Att'y Gen. 20, 21 (1853) (regarding the pardon power); Governorship of Ark., 14 Op. Att'y Gen. 391, 393–94 (1874) (regarding the Guarantee Clause); Recess Appointments, 33 Op. Att'y Gen. 20, 25 (1921) (regarding recess appointments); Authorization To Use Mil. Force in Libya, 2011 WL 1459998, at *1 (O.L.C. Apr. 1, 2011) (regarding constitutional use of force); Testimonial Immunity Before Cong. of the Former Couns. to the President, 2019 WL 2315338, at *2 (O.L.C. May 20, 2019) (regarding executive privilege).

The concrete requirements of the duty will depend on the particular authority at issue. For example, imagine the President were delegated the power to open to the public certain parks around the White House when "the weather outside is conducive to the parks' enjoyment." Exercising such power is not purely discretionary—the President has to find the weather is a certain way, thus the power is conditional and deliberation is required. But the deliberation could be relatively minimal. She could simply step outside and see what the weather was (i.e., gather information) and then consider that information in making the relevant judgment. Making this determination would not require full interagency review or anything of the sort.

On the other hand, if the President is delegated authority to lift bans on importing cattle only when such importation can be done "without danger of the introduction or spread of contagious or infectious disease,"[219] then the duty to deliberate would require more fact gathering. The President cannot make this decision without gathering relevant information about what infectious diseases are out there, how likely they are to be introduced or spread if cattle are imported, and so on. To get this information, the President cannot just call it to mind.[220] Instead, the President would have to ask people, presumably within her administration,[221] for the relevant information. After gathering this information, the President would then have to *consider* whether, given the information she has received, importing cattle could be done "without danger of the introduction or spread of contagious or infectious disease."[222]

There are various authorities contingent on the President making relatively vague findings that a particular action is, for example, in the "national interest,"[223] "national security interest,"[224] or "national

219. *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 688 (1892) (quoting Act of Mar. 6, 1866, 14 Stat. 3, 4).

220. Or at least no modern President would have had this information at hand without having to engage in fact-gathering.

221. Conceivably she could ask people outside her administration as well. The point is she has to gather information and consider it before exercising the power.

222. *See Marshall Field & Co.*, 143 U.S. at 688.

223. *See* 7 U.S.C. § 1728a(a) (permitting the delivery of foreign aid if in the "national interest"); 10 U.S.C. § 152 (waiving restrictions on appointing officers if "necessary in the national interest"); 30 U.S.C. § 1412(c)(5) (limiting hard mineral resources processing unless "such restrictions contravene the overriding national interests of the United States").

224. *See* 10 U.S.C. § 12305(a) (empowering the President to suspend "any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States"); 22 U.S.C. § 9524(c) (stating that the President can waive Russian

defense interest of the United States,"[225] or that exempting certain governmental conduct from regulations will be in the "paramount interest of the United States."[226] These are of course relatively broad findings but would still require the President to deliberate. She would have to find out what the likely effect of taking the relevant action would be—i.e., gather information—and then consider whether the effect would be in the relevant "national security," "national defense," or "paramount interest of the United States."[227] Often, she will not already know what the likely effect would be and thus some consultation with other actors—again presumably within the executive branch—would be required to satisfy the duty to deliberate.

In short, the power at issue and the type of condition the President must find, combined with her preexisting knowledge, will help determine what the duty requires. Some exercises of power might require relatively little in the way of deliberative process and others would require much more. Like many procedural obligations, the duty is a standard that develops specific meaning when applied to concrete cases.

III. ENFORCING THE PRESIDENT'S DUTY TO DELIBERATE

Even if we accept that the President has a duty to deliberate, the question remains how such a duty might best be enforced. Such enforcement could be done through different forms of judicial review, internal executive branch constraints, or congressional regulation. This Part takes these three options in turn.

A. JUDICIAL REVIEW

Once we identify the President's positive procedural obligations, understanding how courts can enforce them becomes relatively

sanctions if "in the vital national security interests"); Jerusalem Embassy Act of 1995, Pub. L. No. 104-45, § 7, 109 Stat. 398, 400 (empowering the President to suspend requirements related to moving U.S. Embassy to Jerusalem if doing so "is necessary to protect the national security interests of the United States").

225. *See* 50 U.S.C. § 98f(a) (authorizing release of materials from stockpile if "required for . . . the national defense"); *id.* § 4533 (granting authority to contract for certain industrial resources if material is "essential to the national defense").

226. *See* 42 U.S.C. §§ 4903(b)(2), 6991f(a), 6961(a) (providing for exemptions to federal law if the President determines something is in the "paramount interest of the United States").

227. *See, e.g.*, Roisman, *supra* note 18, at 848–49 ("Common statutory requirements that the President find that certain conduct is in the 'national interest,' 'paramount interest of the United States,' 'national security interest,' or 'national defense' interest . . . require policy judgment, [but] the judgment is based on a set of facts.").

straightforward. If the President has a duty to gather relevant information and make a considered judgment, then courts can require the President to show she has done so, i.e., that she has in fact gathered relevant information and made a considered judgment informed by such information. If the President has not engaged in such deliberation, the President would then need to explain why exigencies justifiably prevented such deliberation. The way courts could enforce the duty is thus a straightforward version of a procedural review requiring the President to establish she has deliberated.

Approaching the question of judicial review from this vantage point might provide something of a starting position for ongoing debates over the optimal form of judicial review of presidential orders. The current debate relating to judicial review of presidential orders spans a range of views. Evan Bernick, David Driesen, and Kathryn Kovacs have all recently suggested that courts ought to apply some variant of administrative law's arbitrary and capricious review to presidential orders.[228] These accounts would thus require the President to engage in record-keeping and at least some technocratic justification.[229] Almost forty years ago, Harold Bruff suggested a heightened form of "rational basis" review typically applicable to legislation, where courts might require the President to include affidavits and in camera proceedings, along with an explanation requirement.[230] Meanwhile, Lisa Manheim and Kathryn Watts caution against "borrowing too reflexively" from either administrative law or statutory review regimes.[231] For their part, they propose a form of a reason-giving review

228. *See, e.g.*, Driesen, *supra* note 19, at 1044–50; *see also* Kathryn Kovacs, Trump v. Hawaii*: A Run of the Mill Administrative Law Case*, YALE J. ON REGUL.: NOTICE & COMMENT (May 3, 2018), https://www.yalejreg.com/nc/trump-v-hawaii-a-run-of-the-mill-administrative-law-case-by-kathryn-e-kovacs [https://perma.cc/X2F5-CLBK] (arguing that APA's arbitrary and capricious review should apply to presidential orders); Bernick, *supra* note 18, at 7, 66 (arguing for "modified version of hard-look arbitrary and capricious review").

229. *See, e.g.*, Bernick, *supra* note 18, at 55 ("The President must compile a record in which he identifies some 'facts and conditions' that support his decision, and those facts and conditions must be sufficiently related to the statutory framework that he is executing as to warrant confidence that he is not acting opportunistically.").

230. *See* Harold H. Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 1, 57–58 (1982) ("If no formal explanation accompanies a presidential decision, a court can require affidavits describing the rationale and can check their veracity through in camera procedures."); *id.* at 59–60 (suggesting an "explanation requirement").

231. *See* Manheim & Watts, *supra* note 19, at 1812, 1814 ("[W]e do not believe that it would be advisable for the courts to blindly transfer either administrative law's many complex deference doctrines or the legislative arena's highly deferential rationality review into the presidential-order context. Instead, we believe that an

that would require the President to "set forth a nonarbitrary justification in the text of her orders themselves," which the court would defer to "so long as the decisional factors that the president relied upon were not legally foreclosed by [] statute[] or the Constitution, and so long as any factual justifications had adequate support."[232]

All of these suggestions have potential normative appeal. The "hard look" approach might be attractive to those who find additional judicial review and constraint of presidential orders appealing. Bruff's and Manheim and Watts's approach would require more of presidential orders than is required today but seeks to be less costly than these versions of hard look review.[233] But while these accounts are undoubtedly valuable and important, the existing debate over which form of judicial review is optimal seems intractable without resort to extremely hard-to-assess normative intuitions or empirical predictions.[234]

This Article approaches the question of what form of judicial review is appropriate in a different way than many of these accounts. Rather than focusing first on how courts ought to review presidential orders, it first seeks to identify the President's positive baseline obligations in exercising power and, only after doing so, derive the appropriate form of judicial review from there.[235] So if the President's procedural obligations require her to deliberate, then courts can review

intermediate approach ultimately might make the most sense—one that neither rubber-stamps presidential orders nor intrudes too severely into the president's policy-making sphere.").

232. *Id.* at 1814–15.

233. *See id.* at 1813 ("It would be difficult for the courts to apply a robust form of arbitrary and capricious review (akin to hard look review) to presidential orders without also effectively demanding more of the presidents who are issuing those orders: perhaps technocratic justifications, detailed records, or more.").

234. That said, if the Supreme Court were to overturn *Franklin v. Massachusetts* and hold that the APA in fact does apply to the President, as Kathryn Kovacs has suggested, then hard look review would be required by positive law and the debate would largely be resolved. *See generally* Kovacs, *supra* note 5.

235. Bernick also first identifies the President's first-order obligations—in his case, based on an originalist account—before deriving the form of judicial review. *See generally* Bernick, *supra* note 18. However, as Bernick notes, his hard look review approach is inconsistent with existing Supreme Court precedent. *See, e.g.*, *id.* at 66 ("[C]ertain moves that the majority made in *Trump v. Hawaii* . . . would have been foreclosed by the faithful execution framework."). And, of course, as noted above, if Kovacs's view is vindicated that the APA applies to the President, that would resolve many of the questions relating to the President's first-order obligations, at least as they apply to statutory delegations. *See* Kovacs, *supra* note 5, at 82–97. Driesen admirably ties his proposed form of review to certain Supreme Court cases, but, in my view, these cases are not sufficient to establish the variant of "hard look review" he proposes. *See infra* note 236.

whether she has satisfied that obligation by conducting straightforward procedural review of whether she has gathered relevant information and made a considered judgment informed by such evidence before exercising power.

The hope of this approach is to perhaps provide a starting point for existing normative debates by tying the form of judicial review directly to the President's existing positive legal obligations. This does not answer the normative question of what form of judicial review is optimal, but perhaps it can serve as a baseline form of review minimally necessary to enforce the President's existing procedural duties.[236]

Some might respond that such bare procedural review will be toothless. But while such review is not as robust as more searching procedural or substantive review, it is not meaningless. It would prevent exercises of presidential power that were conducted purely arbitrarily—without deliberation—such as the first version of the Travel Ban and the transgender military ban.[237] And although requiring mere deliberation might not stop a President dead-set on a certain result, it often will have consequential effects on the world. For example, the list of countries in the third version of the Travel Ban—after the directive had gone through more interagency deliberative process—differed from the list in the first version.[238] This was of course enormously impactful for citizens of the countries taken off or added to the list. In short, interagency process and deliberation are often consequential, even in instances where they do not change the bottom-line policy.[239] Indeed, if requiring interagency deliberation were not

236. Driesen acknowledges that some aspects of arbitrary and capricious review "may not be needed when the President consults widely," Driesen, *supra* note 19, at 1048, suggesting that some of the underlying normative concerns behind such review might be met by deliberation review suggested here.

237. *See, e.g.*, Eggleston & Elbogen, *supra* note 172, at 829–31 (discussing the injunction issued against the first version of the Travel Ban); *id.* at 831–33 ("The President announced the [transgender military ban] policy on Twitter without subjecting it to any intra-executive review beforehand."); Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) ("[T]he Presidential Memorandum [did not] identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest.").

238. The first version of the Travel Ban barred entry by nationals of Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen. *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017). The second version removed Iraq from this list, barring nationals from Iran, Libya, Somalia, Sudan, Syria, and Yemen. *See* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017). The third version added Chad and Venezuela to this list. *See* Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

239. *See*, e.g., Steilen, *supra* note 32, at 507–08 ("A statutory regime mandating interagency review prior to such a declaration . . . would subject 'fabricated or

impactful in any way, it is unlikely presidents would have instituted and continued to adhere to a general practice of engaging in such deliberation.[240] It is worth acknowledging that allegations of discriminatory intent might well warrant stricter scrutiny, just as they do when reviewing exercises of other governmental power. The purpose of this Section is to identify the form of review appropriate for ensuring the President abides by her baseline procedural obligations—questions of discriminatory animus raise distinct issues that will have to be addressed separately.

Even if one accepts that this form of review matches well with the President's positive obligations and that it would not be meaningless, one might still think presidents should have to do more to exercise power than simply consult internally and make a considered judgment. But that is a critique of what the positive law currently is. To establish that courts must require more than such deliberation, one needs to provide some basis for believing more robust requirements are required by positive law, and that case has not been adequately made.[241] To the contrary, a more searching form of judicial review

exaggerated' claims about the scope of a problem to professional scrutiny. Even if it did not prevent manufactured declarations of emergency, such a process might shape the emergency response to answer actual public-policy problems."); Gideon Rose, *How Can the U.S. Fix Its Foreign Policy?*, N.Y. TIMES (June 17, 2020), https://www.nytimes.com/2020/06/17/books/review/exercise-of-power-robert-m-gates.html [https://perma.cc/88GY-ZQUA] (reviewing ROBERT M. GATES, EXERCISE OF POWER: AMERICAN FAILURES, SUCCESSES, AND A NEW PATH FORWARD IN THE POST-COLD WAR WORLD (2020)) ("Good process improves the chances of good outcomes and reduces unforced errors—which are depressingly common at every level."); *cf.* Linde, *supra* note 22, at 253 ("The design does not presuppose philosopher kings elected by philosopher constituents, free from ignorance, sloth, gluttony, avarice, short-sightedness, political cowardice and ambition; quite the contrary. It undertakes to confine political irrationality by process, not what Learned Hand called 'moral adjurations.'"). Of course, this is not to say that the consequences of such deliberation will always be good.

240. *See, e.g.*, Renan, *supra* note 19, at 2221–30 (documenting such practice); Grove, *supra* note 121, at 900–10 (same).

241. This would be different if the Supreme Court accepted Kovacs's argument that *Franklin v. Massachusetts* should be overruled. *See generally* Kovacs, *supra* note 5. David Driesen's recent work identifies some existing Supreme Court precedent in support of his argument that courts ought to apply arbitrary and capricious review to presidential orders. *See* Driesen, *supra* note 19, at 1019–22 (first citing Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935); then citing Highland v. Russell Car & Snow Plow Co., 279 U.S. 253 (1929); and then citing Sterling v. Constantin, 287 U.S. 378 (1932)). But, even if these cases did suggest some form of "arbitrary and capricious" review is permitted, other precedents, including the Court's recent decision in *Trump v. Hawaii*, suggest that such review is not *required* as a matter of positive law. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2409 (2018) (characterizing as "questionable" the proposition that President has to explain his "finding with sufficient detail to enable judicial review"); *see also infra* note 242.

would be very hard to square with the existing Supreme Court precedent reviewing presidential orders.[242]

Apart from such judicial review not being supported by positive law, we also would have to grapple with the normative costs of such review. There are serious—albeit not *a priori* decisive—reasons why we may not wish that courts second-guess the President's substantive decisions in this way. Moreover, it may not be valuable to require the President to engage in technocratic justification for her decisions in the way agencies do—at least in all situations. The President is, after all, not a technocrat. But this gets into complex questions about the level of procedural obligations we might normatively desire for the President, which Part IV takes on directly. In short, there might be good normative reasons to require the President to engage in more procedures than are currently required. But, if we are attempting to derive a form of judicial review that enforces the President's existing *positive* legal obligations, the case has yet to be made that something more than procedural review of deliberation is required.

The bottom line is that the President's existing positive procedural obligations do not require record-keeping and detailed technocratic justification. And, even if we normatively desire more procedural requirements on the President, it is not obvious such requirements should be imposed by courts in the first instance rather than, for example, Congress. If the goal is to identify a form of judicial review that will force the President to comply with her positive obligations as they exist today, procedural review requiring deliberation should suffice.

That said, it is important to recognize the limited ability of judicial review to police presidential conduct. Due to a variety of justiciability, standing, and deference doctrines, court are unlikely to robustly

242. *See, e.g.*, Dalton v. Specter, 511 U.S. 462, 475 (1994) (finding that orders embodying "[p]residential discretion as to political matters [are] beyond the competence of the courts to adjudicate" and "[w]e fully recognize[] that the consequence of our decision [is] to foreclose judicial review"); United States v. George S. Bush & Co., 310 U.S. 371, 379–80 (1940) ("[T]he judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment."); Mississippi v. Johnson, 71 U.S. 475, 499 (1866) ("An attempt on the part of the judicial department of the government to enforce the performance of such duties [that are purely executive and political] by the President might be justly characterized, in the language of Chief Justice Marshal, as 'an absurd and excessive extravagance.'"). Indeed, as noted above, the Court expressed serious skepticism of such a form of review in *Trump v. Hawaii*, going out of its way to characterize as "questionable" the proposition that the President had to explain his "finding with sufficient detail to enable judicial review." 138 S. Ct. at 2409.

police presidential exercises of power.[243] Focusing solely on judicial review will thus not help ensure the President abides by her procedural duties in the vast majority of areas where she has power. To understand how we might best ensure the President complies with her duty, we should examine how the President and Congress might enforce such compliance. The next two Sections take on that task.

B. INTERNAL EXECUTIVE ENFORCEMENT

Because so few exercises of presidential power are likely to be judicially reviewed, the most impactful way to enforce the duty would be internally within the executive branch. If the President were to adopt mechanisms to enforce the duty, these mechanisms could govern *all* exercises of presidential power rather than only those resulting in an injured party with standing to sue in a justiciable case.

Of course, the President will not implement procedural requirements on herself unless she has an incentive to do so. But presidents procedurally constrain themselves all the time.[244] And incentives to formalize procedures to enforce the President's duty to deliberate are not hard to come up with. First, the President might decide that requiring such review will make the end product—the presidential directive—better. This sort of thinking helps explain why presidents voluntarily imposed and continued to follow a formal process for how executive orders and proclamations are issued.[245] Apart from seeking

243. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1098 (2013) ("A variety of justiciability limitations . . . are regularly invoked by courts as a basis for declining to resolve issues of presidential power, especially when individual rights are not directly implicated."); Stack, *supra* note 19, at 1173–77 (explaining that current doctrine "operates to exclude judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power"); Kagan, *supra* note 31, at 2369. Manheim and Watts suggest judicial review of presidential orders is likely to increase going forward, *see, e.g.*, Manheim & Watts, *supra* note 19, at 1748, which may well be correct, but it is still likely to exclude most areas where the President has power. For an account of why courts are unlikely to reign in executive power in a robust way due to judicial capacity constraints, see Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765 (2016).

244. *See, e.g.*, Roisman, *supra* note 18, at 889; Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 433 (2009) ("Presidents frequently support imposition of internal mechanisms that substantially constrain the Executive Branch and even sometimes adopt such measures voluntarily . . . ."); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 801–02 (2011).

245. *See, e.g.*, Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138, 148–56 (2012) (describing history of such procedural

to create a more thought-through product, future presidents might have other incentives to make the existing procedural requirements more robust. If there was a high-profile scandal resulting from a lack of deliberation, there would be political incentives to show that such a mistake would not be repeated. And, more broadly, a new President might seek to show his or her difference from past presidents by emphasizing their commitment to procedural formality. Such a political dynamic might well follow a President like President Trump, who is well known for making powerful decisions on the fly. So although a President may not be likely to implement reforms to ensure she abides by her procedural duties for completely altruistic reasons, it is not hard to envision the political incentives to do so. And the more scholars and others discuss the President's existing procedural obligations and how they might be enforced, the more likely it is a President would be inclined to adopt such reforms. Indeed, the more such reforms are seen as necessary to comply with *legal obligations*, the more likely they are to be complied with given the pervasiveness of legal review within the executive branch.[246]

What might these reforms look like? There are two relatively straightforward ways the President could improve compliance with the duty to deliberate. First, she might amend the order governing promulgation of executive orders and proclamations to require interagency review before they are issued. This would not be very onerous, given that presidents in modern times have adopted a general practice of interagency review before exercising power through formal directive.[247] But, while this interagency review practice is common, it is not formally required by presidential directive.[248]

regulation starting with Franklin Delano Roosevelt); *id.* at 149 ("[T]he process was put in place to prevent the president from being forced into what Dick Cheney once termed 'oh, by the way . . .' decisions, made on the fly in informal bilateral encounters with administration officials.").

246. *See, e.g.*, Bradley & Morrison, *supra* note 243, at 1132–34 (observing that "[t]he executive branch contains thousands of lawyers" who typically internalize legal norms as a constraint); Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 80–81 (2017) ("Few agency policies and sanctioned actions go unvetted by lawyers, and agency lawyers often wield substantial power . . . over agency policy.").

247. *See* Renan, *supra* note 19, at 2221–30 (describing a "deliberative presidency" norm that serves to "render the exercise of presidential judgment nonarbitrary"); Grove, *supra* note 121, at 900–08 (describing interagency consultation process); Roisman, *supra* note 18, at 875–76 (describing formal executive order interagency approval process).

248. *See* Roisman, *supra* note 18, at 876.

The formal executive order governing the issuing of orders and proclamations requires proposed directives to be submitted to the Director of the Office of Management and Budget (OMB), accompanied by a letter from the head or other authorizing official at the originating agency "explaining the nature, purpose, background, and effect of the proposed Executive order or proclamation."[249] If the Director of OMB approves the proposed directive, it is then transmitted to the Attorney General for "his consideration as to both form and legality," a review function now delegated to OLC.[250] If the order is approved for "form and legality," it is then transmitted to the Director of the Office of the Federal Register, who, upon approving certain formatting requirements, transmits it to the President for signature.[251] Nothing in the order requires interagency review.[252]

So, while a basic practice has developed whereby, before exercising power, the President consults relevant agency and White House officials with subject-area expertise and responsibility, this practice is not formally required and, perhaps unsurprisingly, such interagency review is not always conducted.[253]

This leaves a fairly straightforward solution. The President could help ensure compliance with the duty to deliberate by formally requiring interagency review before promulgating formal directives.[254] Of course, the President would have to be wary of making this review process overly burdensome.[255] For example, true emergency situations could be exempted from such interagency review,[256] or a

249. Exec. Order No. 11,030, 27 Fed. Reg. 5847, § 2(a) (June 21, 1962).

250. *Id.* § 2(b); 28 C.F.R. § 0.25(b) (2018) (assigning "form and legality" review to the Office of Legal Counsel).

251. Exec. Order No. 11,030, 27 Fed. Reg. 5847, § 2(c)–(d).

252. *See generally* Exec. Order No. 11,030, 27 Fed. Reg. 5847.

253. *See* KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 61 (2001) (suggesting the solicitation of interagency review might be limited to "particularly complex or far-reaching orders"); Rudalevige, *supra* note 245, at 150 (noting that "White House-driven orders" were only "usually" subject to such clearance); Eggleston & Elbogen, *supra* note 172, at 829–30 (discussing how the first version of the Travel Ban skipped interagency review); Steilen, *supra* note 32, at 500 (same).

254. I have previously suggested that factfinding underlying such orders be subject to interagency review and formal sign-off. *See* Roisman, *supra* note 18, at 886. This proposal could be expanded to all findings, including those of policy judgment.

255. *Cf.*, *e.g.*, Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 675 (2015) (discussing balancing costs of process against benefits of governance).

256. *See, e.g.*, Roisman, *supra* note 18, at 888–89; *cf.* Bruff, *supra* note 230, at 58 ("[A]ny legal prerequisites to presidential decision must allow for response to emergencies.").

"significance threshold" could be imposed, whereby only "significant" directives would be subject to formal interagency review, while less robust forms of deliberation would be sufficient for less significant directives.[257] Requiring interagency review before every formal presidential directive might require more deliberation than is necessary to comply with the minimum duty of gathering relevant information and making a considered judgment upon it. But so long as increased deliberation is not overly costly it seems like a straightforward and commendable way to enforce the duty. It also seems practically feasible given that the President already often engages in this practice.

Another way the President could help ensure she abides by the duty to deliberate would be to issue an executive order clarifying that exercises of power *not subject to deliberation* are not valid orders and therefore should be ignored. Doing so might seem redundant, but it would be a belt-and-suspenders way of seeking to ensure compliance and would also help capture instances of exercises of power not done by formal directive but that still require deliberation.

Although this solution might seem unnecessary, recent events during the Trump administration suggest otherwise. There have been numerous examples of President Trump seeking to exercise power off-the-cuff, arbitrarily, without any deliberative process. At times, such orders have been ignored by the President's subordinates.[258] For

257. *Cf.* Roisman, *supra* note 18, at 888 n.281 ("Constructing the appropriate 'significance' threshold would no doubt be complex, but such thresholds have been constructed before. For example, only regulations that meet a defined 'significance' threshold must go through centralized OMB review, a determination made routinely within the executive branch."); *see* Exec. Order No. 12,866, 58 Fed. Reg. 51,735, § 3(f) (Sept. 30, 1993) (defining "significant regulatory action" as an action that, inter alia, would "[h]ave an annual effect on the economy of $100 million or more").

258. *See, e.g.*, Rob Gillies, *Secretary of Navy Says Trump's Tweet Is Not a Formal Order*, ABC NEWS (Nov. 24, 2019, 7:00 AM), https://abcnews.go.com/International/wireStory/secretary-navy-trumps-tweet-formal-order-67257130 [https://perma.cc/SCR8-J467] ("The secretary of the U.S. Navy said he doesn't consider a tweet by President Donald Trump an order and would need a formal order to stop a review of a sailor who could lose his status as a Navy SEAL."); Julian Borger, *Trump Called for Seoul Evacuation at Height of North Korea Tensions, New Book Says*, GUARDIAN (Dec. 9, 2019, 9:25 PM), https://www.theguardian.com/us-news/2019/dec/09/trump-seoul-evacuation-north-korea-book [https://perma.cc/C3VY-SXFZ] (detailing an off-the-cuff order by the President to evacuate Seoul which was ignored by the military); *id.* ("It was one of a number of occasions that the defense secretary at the time, James Mattis, ignored direction from the White House. He also refused to send defense department officials to a planned Korea war game at Camp David in the autumn of 2017, or to provide military options for intercepting North Korean ships suspected of sanctions busting."); Josh Gerstein, *'This One's a Lemon' Vs. 'Is He Above the Law?': Judges Spar over Trump Emoluments Case*, POLITICO (Dec. 12, 2019, 7:38 PM), https://www.politico.com/news/2019/12/12/judges-spar-trump-emoluments-case-083807 [https://perma.cc/3HE9

example, the President's tweet that "the United States Government will not accept or allow . . . Transgender individuals to serve in . . . the U.S. Military" was ignored by military officials until a more formal directive was issued by the Secretary of Defense.[259] Similarly, President Trump's order to fire the Ambassador to Ukraine was not followed through on for over a year.[260] And former Secretary of Defense James Mattis reportedly repeatedly "simply ignored the President's directives, considering them insufficiently thought through."[261]

Why was it that people required to obey the President's commands did not follow them in these instances? It is not clear precisely what explains these instances, but one theory that might *justify them* is to take the duty to deliberate seriously. Because the President failed to abide by his procedural obligations, he had not, in fact, lawfully exercised authority. Thus, his subordinates were justified in refusing to comply with them. Going forward, a future President could formalize a requirement that presidential directives not subject to due deliberation are not lawful, binding orders.[262] This could be done through an executive order or presidential memorandum and could thus make formal this sporadic practice of disobedience of arbitrary orders.

Of course, even adopting these proposed reforms would not fully ensure the President abides by her duty to deliberate in all instances. Even if the President is required to engage in interagency review and

-G484] (detailing high-level Department of Justice attorney stating that President Trump's statement that the emoluments clause was "phony" should be discounted because "[i]t was either a tweet or an off-the-cuff statement"). Indeed, President Trump is not the first President to have his impulsive orders ignored. President Nixon also was ignored when he ordered his Chief of Staff to ask the White House personnel chief to "see what we can do about" Jews serving in the federal government. *See President Nixon on Jews in the Government*, U. VA. MILLER CTR., https://millercenter.org/the-presidency/educational-resources/president-nixon-and-bob-haldeman-on-fred-malek [https://perma.cc/42ES-3X9J].

259. *See, e.g.*, Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1196–97 (2020).

260. Katherine Faulders, John Santucci, Allison Pecorin & Olivia Rubin, *'Take Her Out': Recording Appears to Capture Trump at Private Dinner Saying He Wants Ukraine Ambassador Fired*, ABC NEWS (Jan. 24, 2020, 9:04 PM), https://abcnews.go.com/Politics/recording-appears-capture-trump-private-dinner-ukraine-ambassador/story?id=68506437 [https://perma.cc/LU9P-7ERP] (showing that President Trump told his deputy chief of staff to fire the Ambassador to Ukraine, but she was not fired for another year).

261. Filkins, *supra* note 29.

262. Of course, the order would have to be worded carefully, as the president likely would not want to give subordinate officials too much power to interpret what "due deliberation" might mean. How precisely to navigate this issue could be complex, but this complexity does not seem insurmountable.

deliberation, that does not mean she cannot reach a foreordained conclusion, and a future President could always rescind such orders. But these requirements would likely be impactful. As noted above, requiring directives to go through a deliberative process often concretely affects the final product, even when the ultimate outcome is foreordained.[263] And, presumably, in some instances, the deliberative process will result in a different ultimate outcome as well. And although a future President could rescind such orders, doing so would be costly—it would essentially be an acknowledgment that the President wished to exercise power arbitrarily, without proper deliberation. Thus, there is good reason to think that, once promulgated, such orders could be quite sticky, as the existing orders formalizing the process for executive orders and proclamations have been.[264]

To be sure, this proposal cannot ensure universal compliance with the President's duty to deliberate, because there is no such thing as universal compliance with the law.[265] All one can endeavor to do is help improve compliance, and this approach would likely do that.

C. CONGRESSIONAL ENFORCEMENT

Congress could also do more to enforce the President's duty to deliberate. One way to do so would be to pass a framework statute requiring interagency deliberation before the President can exercise delegated power. Such a statute would clarify that when Congress requires the President to make a particular determination in order to exercise power—such as finding that certain conduct is in the "national security" interest or the "paramount interest of the United States,"—barring some emergency or other good cause, the President can only make that determination after gathering relevant information and consulting subject-matter experts within the executive branch.

Some might argue such a statute would be facially unconstitutional,[266] but there is little reason to think it would be.[267] Although the

263. *See supra* notes 238–41 and accompanying text.

264. *See* Rudalevige, *supra* note 245, at 148–51.

265. For example, although criminal law enforcement obviously constrains conduct to some extent, it does not eliminate all crime.

266. *Cf.* Common Legis. Encroachments on Exec. Branch Auth., 13 Op. O.L.C. 248, 253–54 (1989) (suggesting some statutory consultation requirements constitute unconstitutional "micromanagement" of executive branch).

267. Such power, in fact, might be thought to flow rather naturally from the Necessary and Proper Clause. U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other powers vested by this Constitution in the Government

Supreme Court has expressed some misgivings about Congress procedurally regulating the President's exercise of power,[268] it has never stated such procedural regulation is impermissible.[269] And, in fact, Congress routinely regulates how the President exercises statutory power procedurally.[270] I am not aware of anyone suggesting that the Antiquities Act of 1906's requirement that the President create national monuments via "proclamation" is a constitutional violation.[271] Yet, of course, dictating the format by which the President can exercise her power to create a monument is a procedural obligation. Moreover, the Court has frequently relied on Congress's procedural regulations as supporting its analysis of why particular delegations to the President did not violate the nondelegation doctrine,[272] or why it could not

of the United States . . . ."); *see* Steilen, *supra* note 32, at 502 (suggesting Necessary and Proper Clause grants such power); Todd David Peterson, *Procedural Checks: How the Constitution (and Congress) Control the Power of the Three Branches*, 13 DUKE J. CONST. L. & PUB. POL'Y 209, 251 (2017) ("The Necessary and Proper Clause gives Congress the express constitutional authority to establish procedural checks on the manner in which the executive branch carries out authority delegated to it by Congress.").

268. *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992) ("Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence [regarding the President in the APA] is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.").

269. *Cf.* Steilen, *supra* note 32, at 502 ("The Supreme Court has repeatedly affirmed that Congress may subject the President and principal executive officers to procedural requirements imposed by law."). For an analogous and compelling account of why Congress has the power to procedurally regulate the President, see *id.* at 502–08.

270. *See, e.g.*, Roisman, *supra* note 18, at 892–93 (collecting examples of existing congressional procedural regulations of presidential factfinding).

271. 54 U.S.C. § 320301(a) ("The President may . . . declare by public proclamation historic landmarks . . . that are situated on land owned or controlled by the Federal Government to be national monuments.").

272. *See, e.g.*, J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405 (1928) ("[B]efore the President reaches a conclusion on the subject of investigation [delegated to him], the Tariff Commission must make an investigation, and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard."); Gundy v. United States, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (suggesting that the statute at issue in *J.W. Hampton* was constitutional in part because the statute "offered guidance on how to determine costs of production listing several relevant factors and establishing *a process for* interested parties to submit evidence" (emphasis added)); Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976) ("Section 232(b) easily fulfills [the 'intelligible principle'] test. It establishes clear preconditions to Presidential action . . . ."); Clinton v. City of New York, 524 U.S. 417, 484–85 (1998) (Breyer, J., dissenting) (stating that one way in which the Line Item Veto Act creates an "intelligible principle" is "procedural. The Act tells the president that, in 'identifying dollar amounts [or] . . . items . . . for cancellation' . . . he is to 'consider . . . any specific sources of information referenced in [relevant] law or . . . the best

review presidential exercises of power.[273] And many scholars have explained the Court's invalidation of delegations in *Panama Refining* and *Schechter Poultry* as motivated, at least in part, by the fact that Congress had *failed* to regulate the President's power procedurally.[274] The Court's decision in these lines of cases would not make sense if Congress were categorically barred from procedurally regulating the President. Thus, there is no categorical bar on Congress regulating the President's exercise of statutory power procedurally and requiring internal deliberation in particular would not be novel either. The Court has previously upheld delegations to the President where the President could only exercise power following the actions of other executive branch actors.[275]

It is worth noting that even the Trump administration—which was very protective of presidential power—did not seem to view such a requirement as presumptively invalid. For example, OLC concluded that the President could withhold certain reports by the Secretary of

available information . . . .'"); Pan. Refin. Co. v. Ryan, 293 U.S. 388, 432 (1935) ("'In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a *certain course of procedure* and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action . . . .' We cannot regard the President as immune from the application of these constitutional principles." (emphasis added) (citing and discussing Wichita R.R. & Light Co. v. Pub. Utils. Comm'n, 260 U.S. 48, 59 (1922))).

273. *See, e.g.*, United States v. George S. Bush & Co., 310 U.S. 371, 379–80 (1940) ("[T]he judgment of the President that on the facts, *adduced in pursuance of the procedure prescribed by Congress*, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment." (emphasis added)).

274. *See, e.g.*, Kagan, *supra* note 31, at 2365 ("The awesome substantive breadth of this delegation [in Schechter Poultry], combined with its *lack of procedural constraints* . . . made it ripe for invalidation . . . ." (emphasis added)); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, N.Y.U. L. REV. 461, 525 (2003) ("[T]he Court regarded the President as part of the problem in *Schechter Poultry* and *Panama Refining* . . . . No agency or *administrative process* stood between the President and private groups, as some sort of mediating influence." (emphasis added)); *see also* Steilen, *supra* note 32, at 512 ("One can see evidence of [the] influence [of procedure] in *Schechter Poultry v. United States*, where the Court complained not only of the broad scope of rule-making authority conferred on the President, but of the absence of any 'administrative procedure' for exercising that authority.").

275. *See, e.g.*, *J.W. Hampton*, 276 U.S. at 402 (upholding delegation where "[i]nvestigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made").

Commerce to the President relating to whether automobile imports threaten national security pursuant to the "deliberative process" privilege.[276] In doing so, however, OLC did not bother to question the statutory scheme, which makes the President's power to impose tariffs contingent on the Secretary of Commerce conducting an investigation and giving the President a report.[277] Such a statutory scheme—which is again not novel—is the equivalent of an internal deliberation or consultation requirement.

There is thus nothing presumptively unconstitutional about Congress requiring the President to deliberate before exercising statutory power. That said, procedural requirements might be unconstitutional *in certain instances*. This would depend on standard separation of powers balancing, which requires determining whether Congress's procedural requirements "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions" and, if so, whether "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress."[278] It is possible such procedural requirements might be unconstitutional in some circumstances,[279] but a framework statute requiring deliberation would appear to be constitutional as a general matter.

276. Publ'n of a Rep. to the President on the Effect of Auto. and Auto.-Part Imps. on the Nat'l Sec., 44 Op. O.L.C. __ (Jan. 17, 2020) (slip op. at 10–11) https://www.justice.gov/olc/opinion/publication-report-president-effect-automobile-and-automobile-part-imports-national [https://perma.cc/B7JF-R7C2] ("The [Secretary of Commerce's] report, almost by definition, comprises . . . deliberative material . . . .").

277. *See id.* at 2 ("Before the President may take such an action [to adjust imports], however, the Secretary of Commerce must conduct, on request or his own motion, an 'appropriate investigation to determine the effects on the national security of imports of the article.' . . . If the Secretary finds that the relevant imports 'threaten to impair the national security,' then the President has 90 days to decide whether he agrees with that finding."). To be clear, the constitutionality of this scheme was not addressed by OLC explicitly, but the fact it did not think the scheme even merited questioning is illustrative.

278. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977); *see also* Const. Separation of Powers Between the President & Cong., 20 Op. O.L.C. 124, 133 (1996) (discussing such balancing under the "General Separation of Powers Principle").

279. For an example of analogous analysis, the Department of Defense claimed that a requirement to notify Congress before transferring detainees from Guantanamo was unconstitutional when applied to the swap of such detainees for American prisoner of war Bowe Bergdahl. *See, e.g.*, Jack Goldsmith, *Was the Bergdahl Swap Lawful?*, LAWFARE (Mar. 25, 2015, 9:19 PM), https://www.lawfareblog.com/was-bergdahl-swap-lawful [https://perma.cc/L6Z2-FAEG] ("DOD's constitutional analysis [stated]: . . . [E]ven though, as a general matter, Congress had authority under its constitutional powers related to war and the military [for a 30 days' notice of transfer] . . . that provision would have been unconstitutional to the extent it applied to the unique circumstances of this transfer.").

If Congress attempted to regulate the President's *constitutional* authorities, it would raise thornier issues.[280] That said, it is not clear why even where the President's constitutional authorities are at issue, anything more than separation of powers balancing is required. After all, the separation of powers balancing test set forth in *Nixon* applied to a constitutional authority.[281] Thus, it might be easier to show the requisite burden for constitutional authorities, but that burden would still have to be met.[282]

In short, Congress too could seek to enforce the President's duty to deliberate, and, in fact, is likely better positioned to do so than courts, given its democratic legitimacy and ability to consider the benefits and costs of such regulation. That said, whether it would have the political will to do so is another question entirely.[283]

IV. THE NORMATIVE SUFFICIENCY OF THE PRESIDENT'S DUTY TO DELIBERATE

Even if one accepts that the President has a duty to deliberate and that the best way to enforce it is to have the courts, the President, or Congress require the President to engage in some form of interagency consultation and consideration before exercising power, a stark normative question remains: Are such deliberative procedures normatively sufficient? We clearly do not think that agencies can exercise significant power legitimately simply by first engaging in internal

280. *See, e.g.*, Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1252 (2003) ("It is unlikely . . . that the Supreme Court would permit Congress to impose even these procedural restrictions directly on the President himself.").

281. *See Nixon*, 433 U.S. at 441 ("We reject at the outset appellant's argument that the Act's regulation of the disposition of Presidential materials within the Executive Branch constitutes, without more, a violation of the principle of separation of powers."); *id.* at 444–45 ("[W]hatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face.").

282. *See, e.g.*, *January 9, 2006 Letter from Scholars and Former Government Officials to Congressional Leadership in Response to Justice Department Letter of December 22, 2005*, 81 IND. L.J. 1364, 1368 (2006) ("In [passing FISA], Congress did not deny that the President has constitutional power to conduct electronic surveillance for national security purposes; rather, Congress properly concluded that ' . . . Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted.' . . . This analysis, Congress noted, was 'supported by two successive Attorneys General.'" (citing H.R. REP. NO. 95-1283, pt. 1, at 24 (1978))).

283. That question will have to wait for another day.

executive branch consultation. So why would it be permissible for the President to do so?

The existing literature on the topic has not focused on this question.[284] Administrative law scholarship has long struggled with how to justify the vast power exercised by administrative agencies.[285] It started by seeking to legitimate such power by conceiving of agencies as serving as mere "transmission belt[s]" for Congress's desires.[286] When this theory became untenable, it was replaced by a model that legitimated agency power based on agency "expertise."[287] And, when that failed, administrative power was justified based on a theory of "interest representation."[288] Finally, when that model failed, administrative law scholars sought to legitimate agency power through the President's role in so-called "presidential administration."[289] Under this model—the current reigning justificatory model—the President's role in influencing and coordinating administrative action legitimates

284. A notable exception is Kathryn Kovacs's contemporaneous article arguing that the APA should apply to the President's exercise of statutory authority—both as a matter of positive law and to further a number of normative values. *See* Kovacs, *supra* note 5. Like the discussion below, Kovacs's account would suggest that mere internal deliberation is insufficient to legitimate the vast array of the President's power. Kovacs would thus have the Supreme Court overturn its decision in *Franklin v. Massachusetts* and apply the APA to the President. The discussion below assumes that the Court does not overturn its decision in *Franklin*, and asks how we might best conceptualize procedurally regulating the President outside of the APA.

285. For an excellent summary of the progression of the justificatory models, see Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 478–79 (2014):

> In the early era of administrative law, commentators depicted agency decisionmaking as a "transmission belt" that merely carried congressional intent into action . . . . When open-ended New Deal delegations to agencies made the transmission belt concept implausible, a second approach cast administration as a science. Under this expertise model, the discipline inherent in the objective work of bureaucrats legitimated agencies from within. But this model too emerged as inapt; few administrative decisions were purely technical, and administrators were susceptible to influence—particularly industry influence—as they made value judgments. That observation spurred reforms toward a third model of "interest representation," in which legitimacy stems from a quasi-legislative process that accounts for all interests, not just those of powerful regulated entities. . . . Finally, in the most recent model, attention has shifted to the President and the legitimacy that stems from centralized decisionmaking responsive to a national majority.

286. *Id.* at 478.

287. *Id.*

288. *See id. See generally* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

289. *See* Seifter, *supra* note 285, at 479.

administrative power largely because of the President's democratic accountability.[290]

There has now been an enormous body of work on "presidential administration" both defending and critiquing the President's role in directing or influencing the conduct of agencies. But this literature considers the President's role *on top of* the procedural requirements applicable to agencies.[291] This literature has not focused on whether the President's accountability *without* the procedures required of administrative agencies can legitimate *presidential* exercises of power. And there is reason to be skeptical that it can. No account of presidential administration seeks to defend the President's role as sufficient to legitimize executive power *in lieu of* such procedural requirements. Indeed, even presidential administration's most prominent defender, then-Professor Elena Kagan, seemed uncomfortable with direct delegations to the President rather than delegations to agency officials.[292] In short, many critics of presidential administration would undoubtedly be unsatisfied with the President's ability to exercise power solely by consulting experts within the executive branch,[293] but it is not clear that even defenders of presidential administration would defend such conduct.[294]

290. *See id.* ("Most scholars now agree that the presidential control model is dominant, such that the legitimacy of administrative action turns on agency adherence to the President's direction and, by extension, to the preferences of the national majority."); Kagan, *supra* note 31, at 2331–46 (arguing for presidential model on accountability and effectiveness grounds); Bressman, *supra* note 274, at 490 ("[The model] attempts to legitimate administrative policy decisions, through presidential politics, on the ground that they are responsive to public preferences.").

291. *See, e.g.*, *supra* note 31 and accompanying text (collecting prominent sources in this debate).

292. *See* Kagan, *supra* note 31, at 2369 ("[G]iven the difficulty of controlling the exercise of discretion delegated to the President—rule of law values may counsel extra hesitation in allowing the delegation in the first instance."); *cf.* Clinton v. City of New York, 524 U.S. 417, 489–90 (Breyer, J., dissenting) (suggesting lack of administrative standards and judicial review as reasons to doubt delegations to the President); Todd D. Rakoff, *The Shape of the Law in the American Administrative State*, 11 TEL AVIV U. STUD. L. 9, 22–23 (1992) (discussing the problematic nature of the President being both "omnipowered and omnicompetent").

293. *See, e.g.*, Bressman, *supra* note 274 (explaining how a President's accountability in presidential administration is insufficient to address constitutional concerns about arbitrary governance); Kathryn E. Kovacs, *Rules About Rulemaking and the Rise of the Unitary Executive*, 70 ADMIN. L. REV. 515, 566 (2018) (stating that "direct presidential control of agency decisionmaking" resembles autocracy, and "[u]nless the President is obligated to consider a multiplicity of public views in an open decisionmaking process, he should not be engaged in the quasi-legislative function of rulemaking").

294. *See, e.g.*, Kagan, *supra* note 31, at 2369; *see also* Watts, s*upra* note 31, at 744 (noting the "need to ensure that presidential control does not undermine the notice-

Put simply, if we take seriously the concerns with executive branch governance that are well trod in the administrative law domain,[295] it seems hard to accept the view that the vast array of power delegated directly to the President, surveyed in Part I, can be legitimately exercised simply by consulting officials within the executive branch. Although the President may not always need to go through more procedures before legitimately exercising power, it seems doubtful that the President can legitimately exercise *all the powers delegated to her*—over the environment, domestic prices, immigration, government regulation, and so on—solely by engaging in internal deliberation and reasoned consideration.[296]

But, even if more procedural requirements are warranted, this does not necessarily mean we should simply apply administrative law to the President. There is good reason to think presidential law ought to differ in important respects from administrative law.[297] First, the President is positioned meaningfully differently than agencies in important ways. The core competency of agencies has long been their expertise.[298] What concerned people was primarily their lack of accountability.[299] The President is situated in the opposite direction.

and-comment process or the public's right to participate in that process in a meaningful way").

295. To be sure, there are important arguments that we should not take such concerns as seriously as we have. *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019).

296. Scholars sympathetic to Lisa Bressman's terrific account of arbitrariness concerns that remain notwithstanding the President's role in administration, might be particularly concerned. *See generally* Bressman, *supra* note 274.

297. As noted above, *supra* note 284, Kathryn Kovacs has argued that we ought to apply the APA's procedural requirements to the President both as a matter of the proper interpretation of the APA and for a number of normative reasons relating to public participation, political accountability, transparency, deliberation, and uniformity. *See generally* Kovacs, *supra* note 5, at 97–106. However, if the Supreme Court does not overturn *Franklin v. Massachusetts* and apply the APA to the President, then conceptualizing the optimal procedure for the President allows us to start from scratch. This can provide an exciting opportunity to apply lessons we have learned from the history of the development of the administrative law of agencies to design a body of procedural law tailored specifically to the President. *See infra* notes 303–06 and accompanying text.

298. *See* PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 164 (2009) ("Expertise provides a foundational rationale for the entire phenomenon of specialized agencies under different administrators."); Kovacs, *supra* note 293, at 565 (noting "expertise" as a "purpose for and benefit[] of administrative agencies"); Kagan, *supra* note 31, at 2261 (noting how expertise served as a dominant justification for agency power).

299. *See* Bagley, *supra* note 295, at 372 ("Agencies are . . . said to labor under an acute democratic deficit . . . ."); Manheim & Watts, *supra* note 19, at 1798 ("[A]

What she has is relative formal accountability,[300] and what she lacks is expertise.[301] In some ways, the President's accountability combined with her duty to deliberate might address some of the President's core weaknesses here. If the President deliberates by consulting with the relevant subject-matter experts in the executive branch, the President can act in a way informed both by agency expertise *and* her direct accountability. The duty to deliberate could thus help address some of the concerns we might have about presidential exercises of power.[302]

But, consulting internal experts in combination with the President's accountability is still unlikely to be sufficient to legitimate all the President's exercises of power. First, there are many reasons to doubt the robustness of the President's direct accountability.[303] Meanwhile, "expertise" has long been deemed insufficient to justify agency power.[304] Moreover, if combining the President's accountability with agency expertise in this way were sufficient to legitimate the President's exercise of power, then the upshot of the presidential administration literature would be that when the President and an agency

motivating force behind the judiciary's creation of many administrative law principles has been political accountability."); Stewart, *supra* note 288, at 1675 (discussing how administrative law "legitimates intrusions into private liberties by agency officials not subject to electoral control"); *cf.* Bressman, *supra* note 274, at 472 (noting critiques of expertise model not rooted solely in lack of accountability).

300. *See, e.g.*, Kagan, *supra* note 31, at 2334–37 (discussing the President's comparative advantage with respect to accountability). Of course, there are many reasons to doubt how meaningful this accountability is. *See infra* note 303 and accompanying text.

301. *See* Kovacs, *supra* note 293, at 565 ("[T]he President lacks the expertise of agencies."); SHANE, *supra* note 298 ("The ideal of expertise argues strongly for diffusing policy making authority to specialized agencies with the capacity and incentive to master their own policy domains."); Kagan, *supra* note 31, at 2352; Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51.

302. *See* Steilen, *supra* note 32, at 507 ("Responsiveness to 'the reason of the public' is achieved by a participatory and reflective presidential policy-making process, not by a slapdash one. On these assumptions, a statutory regime incorporating interagency procedures would enhance, rather than degrade, the popular legitimacy of presidential policies.").

303. *See, e.g.*, Roisman, *supra* note 18, at 880–81; Nina Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1160–61 (2010) (describing the difficulty of holding a President accountable given low-information voting, infrequency of elections, and breadth of issues); Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REGUL. 549, 612 (2018) (suggesting the President is not necessarily more accountable than agencies); Kovacs, *supra* note 293, at 100 (suggesting agencies are more accountable than the President).

304. *See, e.g.*, Stewart, *supra* note 288, at 1711 (noting the "breakdown" of the expertise model); Kagan, *supra* note 31, at 2261–64 (describing expertise model as "almost quaint").

agree on an exercise of power, then the agency need not go through the typical procedural requirements of the APA. But no one has seemed to suggest that. In short, while the President can plausibly claim to combine some level of accountability and, upon proper deliberation, some level of expertise, it is unlikely this combination can justify the relatively minimal procedural requirements of deliberation in all the areas the President can exercise power. But it may well justify different procedures in some instances than those applicable to agencies.[305]

Apart from the strengths and weaknesses of the President in relation to agencies, there are other reasons not to automatically apply administrative law to the President. Simply put, the body of administrative law that exists today is historically contingent. It originated in the particular concerns that led to the enactment of the APA in 1946 and has been broadened and refined through judicial doctrine reviewing agency action since then.[306] It is inextricably tied to perceptions of the breadth of power of the administrative state and its relationship to "the status of the individual in society."[307] It would be surprising if the form of regulation that has emerged to deal with agency power between 1946 and today has been optimal,[308] let alone that it can be simply applied to a different actor. Perhaps no administrative law scholar thinks administrative law has struck the balance exactly right,[309] and surely we have learned some lessons in how to procedurally regulate executive power over the course of the last eighty years.

305. For example, administrative law's full complement of notice and comment requirements might be less necessary for the President than for agencies because of the President's accountability and use of internal expertise. But this is a complex question worthy of future exploration. *See infra* notes 311–14 and accompanying text.

306. *See, e.g.*, Kovacs, *supra* note 293, at 532–45 (noting how judicially created law since the APA differs from the requirements of the APA's text); Jack M. Beermann & Gary Lawson, *Reprocessing* Vermont Yankee, 75 GEO. WASH. L. REV. 856, 857 (2007).

307. Bressman, *supra* note 274, at 478 (citing Stewart, *supra* note 288, at 1812). This is not the same problem for the President, who has expansive power but simply does not regulate the bulk of public life—or affect private due process interests—on anything like the scale of the administrative state.

308. *See, e.g.*, Kovacs, *supra* note 293, at 545–55 (suggesting that judicially created procedural requirements that expand the text of the APA have had unintended negative consequences); *see also* Bagley, *supra* note 295, at 400–01 ("[M]inimalism should be the watchword. New procedures should be greeted with suspicion; old procedures should be revisited, with an eye to cutting them back or eliminating them altogether. Administrative law could achieve more by doing less.").

309. Routine among concerns are those relating to potential "ossification" of rulemaking, pushing regulatory policy underground to avoid such burdens, disincentivizing legislative fixes, and incentivizing enhanced presidential power. *See* Kovacs, *supra*

Examining the field of *presidential law* thus provides us with a new and exciting opportunity to take the lessons from *administrative law* and apply them to a new actor, without being burdened by the contingent and ad hoc nature by which administrative law has been created. Surely some features of the current administrative law landscape might be salutary, but others may not be.[310]

But to understand when we ought to add procedural requirements to the President and what such requirements might look like,[311] it would be helpful to have a fuller picture of the world of presidential delegations. In particular, we need a better sense of precisely when the President is delegated power. Part I of this Article provides a survey of this, but a more comprehensive account can help us understand both the substantive range of authorities given to the President, as well as how Congress currently explicitly procedurally regulates such presidential delegations.[312] It would also help to have a robust theory of *why Congress delegates to the President, rather than agencies, at all*. Such a theory is largely absent in the existing literature but would be useful to understand when we might want more or less procedure, and what such procedure might look like.[313] For example, one form of procedure might be desirable if we envision such delegations as premised on the President's accountability.[314] Another form may be more appropriate if such delegations are premised on a desire to take advantage of the President's cross-executive branch perspective and

note 293, at 545–66; Bagley, *supra* note 295, at 401 (calling for review of procedural requirements "with an eye to cutting them back or eliminating them altogether").

310. *See* Bagley, *supra* note 295, at 400 ("Instead of defending proceduralism at a high level of abstraction, lawyers should develop a more granular perspective on the effects that particular procedures have on the task of governance.").

311. Some avenues to explore would be modified notice and comment procedures in certain substantive areas and requiring the President to promulgate more self-binding "administrative standards." *Cf.* Bressman, *supra* note 274, at 530 (calling for resurrection of administrative standards approach in administrative law).

312. For some illustrative examples of how Congress currently procedurally regulates some presidential delegations, see Roisman, *supra* note 18, at 892–93.

313. In a work in progress entitled *Delegating to the President*, I plan to provide such a theory.

314. *See* Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 190 (1986) ("[T]he President is electorally accountable [and] is the only official in government with a national constituency. These characteristics make him uniquely well-situated to design regulatory policy in a way that is responsive to the interests of the public as a whole."); *see also* Kagan, *supra* note 31, at 2331–46 (discussing the President's advantages in accountability and regulatory effectiveness).

responsibility.[315] And another form might be justified if delegations are premised on necessity during an emergency or some other temporary problem.[316] And so on.

Apart from matching procedural requirements to the reasons for delegations, we might wish the procedures to vary by substantive area. Unlike administrative law, the procedural requirements on the President need not be trans-substantive. Perhaps we would want one form of procedure for environmental delegations, one for national monuments, another for price stabilization delegations, and another for foreign sanctions or military organization. We might want more procedures in some areas—say relating to freezing prices in the economy, setting environmental standards, or regulating government procurement contracts—but be comfortable with fewer procedures in other areas—perhaps in dealing with true disasters or public health pandemics.

Surely more can be done to improve how the President exercises power delegated directly to her. But to make progress in that endeavor, it would help to know more about when the President is delegated such power, why such delegations exist, and how Congress currently procedurally regulates such delegations. We should take our time to better understand the phenomenon we seek to regulate as well as to identify the lessons we might learn from the last hundred years of procedural regulation of the burgeoning administrative state. This Section hopes to set the stage for this important project.

315. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1084 (2013) ("From [the President's] vantage point, he can focus on issues that fall within the jurisdiction of a variety of executive and independent agencies, each dealing with only part of the problem."); COMM'N ON L. & THE ECON., A.B.A., FEDERAL REGULATION: ROADS TO REFORM 163 (1979) (statement of Hon. Henry J. Friendly) ("Each agency has a natural devotion to its primary purpose . . . . Someone in Government, and in the short run that someone can only be the President, must have power to make the agencies work together . . . .").

316. The distinction between regularized oversight and one-off regulations was one of the grounds upon which the Attorney General's Committee on Administrative Procedure suggested that delegations to the President, rather than agencies, might be desirable. ATT'Y GEN.'S COMM. ON ADMIN. PROC., FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 100–01 (1941) ("Instead of being simply one means of continuous, integrated regulation, such as most of the regulatory bureaus and commissions undertake, [powers conferred on the President] involve isolated or temporary authority to deal with emergency situations and often the determination of high matters of State.").

CONCLUSION

The President wields enormous power. She regulates, she adjudicates, and she does much, much more. Yet, unlike when agencies exercise such power, we know very little about what procedures the President must go through before exercising power. The question is not what administrative law requires but what a body of *presidential law* requires. This Article argues that this body of law has bite. The President must gather relevant information and make a considered judgment based on it before exercising power. In other words, the President must *deliberate*. Identifying this duty can help clarify recent debates about how courts ought to review presidential exercises of power as well as illuminate how the President and Congress might better enforce these obligations. But it also raises the question of whether the President's positive legal procedural obligations are normatively sufficient. Is it *legitimate* for the President to exercise all the power she is delegated subject only to a requirement that she deliberate within the executive branch before doing so? The answer is likely "yes" for some areas of power, but no for others. But wherever one comes out on this normative question, identifying the positive duty of deliberation is progress. The President is under real procedural obligations before exercising power. "Presidential law" exists. With this knowledge in hand, the project of perfecting it can begin.