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Presidential Laws and the Missing Interpretive Theory

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ARTICLE

PRESIDENTIAL LAWS AND THE MISSING INTERPRETIVE THEORY

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There is something missing in interpretive theory. Recent controversies—involving, for example, the first travel ban and funding for sanctuary cities—demonstrate that presidential "laws" (executive orders, proclamations, and other directives) raise important questions of meaning. Yet, while there is a rich literature on statutory interpretation and a growing one on regulatory interpretation, there is no theory about how to discern the meaning of presidential directives. Courts, for their part, have repeatedly assumed that presidential directives should be treated just like statutes. But that does not seem right: theories of interpretation depend on both constitutional law and institutional setting. For statutes, the relevant law comes from Article I and the procedures governing Congress. For presidential directives, the starting point must be Article II. This Article contends that Article II and the distinct institutional setting of the presidency point toward textualism. Article II, particularly the Opinions Clause, gives the President considerable power to structure the process by which he issues directives. Drawing on various sources—including the author's interviews with officials from the Trump, Obama, and other administrations—this

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Article offers a window into that process. Since at least the 1930s, Presidents have invited agency officials to draft, negotiate over, and redraft presidential directives. The final directive signed by the President may not reflect his preferred substantive policy; instead, Presidents often issue compromise directives that reflect their subordinates' recommendations. This Article argues that courts respect that structure, and hold Presidents accountable for any mistakes, by adhering closely to the text. Thus, whatever one thinks about honoring the textual compromises that come from Congress, there are independent and important reasons to hew strictly to the text that comes from the White House. Notably, this analysis has important implications not only for interpretive theory but also for broader questions about the constitutional separation of powers. In an era of ever-expanding presidential power, Presidents have at times (surprisingly) allowed themselves to be constrained by their own administration.

INTRODUCTION

There is something missing in interpretive theory. Scholars have offered a rich literature on statutory interpretation and a growing one on regulatory interpretation. But what about the "laws" issued by the President himself—that is, the assortment of executive orders, proclamations, memoranda, and other directives? To be sure, commentators recognize that courts may examine the validity of such directives—that is, whether the President exceeded either statutory or constitutional authority.[1] But recent controversies—involving the first travel ban and funding for sanctuary cities—demonstrate that presidential directives raise not only questions of validity but also questions of meaning.[2] Yet Justice Antonin Scalia and Bryan Garner's treatise *Reading Law*—which purports to address "all types of legal instruments" and discusses cases involving the U.S. Constitution, federal statutes, state statutes, and private contracts—does not so much as mention presidential directives.[3] And although some commentary has recognized that courts must interpret such documents, none has offered a comprehensive interpretive theory.[4]

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1 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583-89 (1952) (concluding that the President exceeded his constitutional authority in issuing an executive order directing the seizure of property). Scholarship has explored the question of statutory authorization for presidential directives. *See* Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 545 (2005) (contending that directives "must be traceable to some identifiable" statute); *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 2, 64, 68 (2002) (asserting that courts often liberally "justify the exercise of presidential power"); Joel L. Fleishman & Arthur H. Aufses, *Law and Orders: The Problem of Presidential Legislation*, L. & CONTEMP. PROBS., Summer 1976, at 1, 5-6, 19-25 (arguing that some executive orders rest on doubtful claims of broad statutory or constitutional authority). For a recent analysis of how a litigant might challenge a presidential directive as violating the Constitution or a federal statute, see Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI L. REV. 1743, 1800-23 (2019).

2 *See infra* Section III.B.

3 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012).

4 *See* John E. Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 847-78 (1981) (surveying cases in which executive orders have given rise to private rights of action); Katherine Shaw, *Speech, Intent, and the President*, 104 CORNELL L. REV. 1337, 1345-92 (2019) (surveying the use of "intent" in constitutional law and other areas and suggesting that while presidential intent may be relevant to constitutional law and statutory interpretation, on functional grounds, courts should be wary of relying on intent to interpret presidential directives); Erica Newland, Note, *Executive Orders in Court*, 124 YALE L.J. 2026, 2034-37 (2015) (offering an empirical survey of cases in the D.C. Circuit and Supreme Court and finding that these courts have failed to

The federal judiciary, for its part, has regularly grappled with the meaning of presidential directives for well over a century. Courts have employed a variety of interpretive methods. But significantly, these (otherwise disparate) decisions have repeatedly reaffirmed a common assumption: presidential directives should be treated just like statutes.[5]

This Article challenges that assumption. The argument builds on two (related) premises. First, as many scholars have recognized, much of interpretive theory is, at bottom, a theory of constitutional law.[6] The law that governs statutory interpretation necessarily derives from the constitutional provisions that empower and constrain Congress—principally, Article I. Accordingly, in the statutory interpretation literature, scholars debate the implications of the bicameralism and presentment requirements of Article I, Section 7, and the Rules of Proceedings Clause of Article I, Section 5.[7] By contrast, any theory of interpreting presidential directives must build on the law that governs the President—primarily, Article II.

Second, interpretive theory must also pay close attention to institutional setting. Congress is governed not only by the rules laid out in the Constitution but also by the internal rules and procedures that the House of Representatives and the Senate have crafted (pursuant to their Article I, Section 5 authority). Thus, statutory scholars debate whether, and the extent

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should defer to agency interpretations of executive orders); J.B. Ruhl & James Salzman, *Presidential Exit*, 67 DUKE L.J. 1729, 1739 n.42 (2018) ("Legal scholars have, for the most part, not focused on presidential direct actions.").

5 *See infra* Part I; *see also, e.g.*, *Ex parte* Endo, 323 U.S. 283, 298 (1944) ("We approach the construction of [an executive order] as we would approach the construction of legislation in this field."); De Kay v. United States, 280 F. 465, 472 (1st Cir. 1922) ("In construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes . . . ."); United States v. Abu Marzook, 412 F.Supp.2d 913, 922 (N.D. Ill. 2006) ("The Court interprets Executive Orders in the same manner that it interprets statutes.").

6 *See, e.g.*, John F. Manning, *Constitutional Structure and Statutory Formalism*, 66 U. CHI. L. REV. 685, 686 (1999) (emphasizing the importance of "structural constitutional analysis" to "the basic interpretive commitments of formalism and antiformalism"); Jerry Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) ("Any theory of statutory interpretation is at base a theory about constitutional law."); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1122 (2011) (contending that theories of statutory interpretation are undergirded by normative theories about the separation of powers); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593-94 (1995) (describing the connection between statutory interpretation and democratic theory as "verg[ing] on the canonical"). The focus on constitutional theory is, of course, not universal. *See infra* note 65; *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1084, 1097-99 (2017) (arguing that rules of law governing courts' interpretation of legal instruments are largely unwritten and found neither "in quasi-constitutional doctrines, [nor] the Constitution's text").

7 U.S. CONST. art. I, § 7 (describing the roles of Congress and the President in federal lawmaking); U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings . . . ."); *see also infra* Section I.C.

to which, courts should credit lawmakers' heavy reliance on legislative history.[8] This debate suggests that the interpretation of presidential directives should also be attentive to the institutional setting and procedures of the executive branch. Notably, the process through which presidential directives are issued is not set forth in the Constitution or any federal statute, nor is it widely known in the legal literature. Accordingly, this Article offers readers a window into that process—drawing on both political science research and the author's own interviews with key players from the Trump, Obama, George W. Bush, and other past administrations.[9]

This Article argues that Article II and the distinct institutional setting of the presidency point toward textualism. To be sure, one might assume that because the President is a unitary actor, courts should look to presidential intent. But such an approach would disregard the complex process that Presidents have created pursuant to their Article II authority for presidential lawmaking. Article II, particularly the Opinions Clause, grants the President considerable discretion to structure the process for issuing directives.[10] Since at least the 1930s, Presidents have used that power to invite agency officials to draft, negotiate over, and redraft directives. Notably, the resulting text signed by the President may not reflect his preferred substantive policy. After the interagency consultation process, Presidents often opt to "split[] the difference" among agencies.[11] Alternatively, after a more truncated process, the President may issue a directive that turns out (in hindsight) to have been ill-considered. Article II

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8 *See infra* footnotes 74–82 and accompanying text.

9 Naturally, none of the individuals interviewed necessarily accept this Article's assertions. *See, e.g.*, Telephone Interview with John Bies, Deputy Assistant Attorney Gen., Office of Legal Counsel, Obama Admin. (May 2, 2018) [hereinafter Bies Interview]; Telephone Interview with Paul Clement, Solicitor Gen., George W. Bush Admin. (May 3, 2018) [hereinafter Clement Interview]; Telephone Interview with Rajesh De, Staff Sec'y, Obama Admin. (May 16, 2018) [hereinafter De Interview]; Telephone Interview with Brian Egan, Legal Advisor at Dep't of State, Deputy White House Counsel for Nat'l Sec., and Assistant Gen. Counsel, Dep't of Treasury, Obama Admin. (May 24, 2018) [hereinafter Egan Interview]; Telephone Interview with Chris Fonzone, Deputy Assistant and Deputy Counsel to President and Legal Advisor to Nat'l Sec. Council, Obama Admin. (May 22, 2018) [hereinafter Fonzone Interview]; Telephone Interview with C. Boyden Gray, White House Counsel, George H.W. Bush Admin., and Counsel to Vice President George H.W. Bush, Reagan Admin. (June 27, 2018) [hereinafter Gray Interview]; Telephone Interview with Michael Luttig, Assistant Attorney Gen., Office of Legal Counsel, George H.W. Bush Admin. (July 16, 2018) [hereinafter Luttig Interview]; Interview with Don McGahn, White House Counsel, Trump Admin., in Williamsburg, Va. (March 23, 2018 & Nov. 19, 2018) [hereinafter McGahn Interview]; Interview with Lee Liberman Otis, Assoc. White House Counsel, George H.W. Bush Admin., in Washington, D.C. (June 6, 2018) [hereinafter Otis Interview].

10 *See infra* Section II.A.

11 KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 61-64 (2001); *see also infra* Section II.B.

gives the President the power to make—and holds him accountable for—an informed or ill-informed decision. I argue that courts can best give effect to the structure the President has created—with its potential for compromise and less-than-effective policy—by adhering to the text.

This analysis has important implications for both legal scholarship and recent litigation. First, this Article offers something that has been missing in interpretive theory: an approach for presidential instruments. The Article contends that courts should hew closely to the text of a directive, even when the text may not fit what the court believes to have been the President's primary goal. Second, this Article shows that after agency review, a President may well issue a compromise or even toothless directive. This issue is of great importance in recent litigation over funding for sanctuary cities; President Trump's directive seems to be so watered down as to be legally ineffective at defunding those jurisdictions.[12] This textualist approach also offers a theoretical justification for why—despite the federal government's assertions in defending the first travel ban—courts should not credit a memo from a White House official "clarifying" a presidential directive after the fact.[13] Article II concentrates accountability in the President himself.

Even for those who are not convinced by the textualist method advocated here, this Article should at a minimum provide a roadmap for future work on interpreting presidential directives. Although scholars strongly dispute the proper approach to statutory interpretation, most do seem to agree that interpretive theory must be guided by what this Article has called constitutional and institutional concerns. As this Article asserts, for presidential directives, the starting point must be Article II, not Article I. Moreover, this Article's emphasis on institutional setting links up with what might be called the emerging field of *non*statutory interpretation—recent

12 *See infra* subsection III.B.2.

13 *See infra* subsection III.B.1.

work on interpreting regulations,[14] popular initiatives,[15] and the Federal Rules of Civil Procedure.[16]

Finally, this Article has implications for broader theories of constitutional law and presidential power. The Article shows that for nearly a century, Presidents have (surprisingly) *sought out* advice from, and often agreed to the recommendations of, their subordinates, even when issuing seemingly unilateral directives. That is, presidential directives are less "unilateral" than one might have thought. The Article thus contributes to the literature on the "internal separation of powers" within the executive branch—the idea that the bureaucracy itself may serve (at times) to constrain presidential power.[17]

At the outset, I offer a few points of clarification. First, "textualism" is not self-defining.[18] This Article uses the term to mean that judges must abide by the ordinary meaning of the text of a directive, understood in context. The relevant context encompasses, at a minimum, the text and structure of the directive at issue, other directives issued by the same administration (and likely those from past administrations), as well as linguistic conventions from legal terms of art, dictionaries, and colloquial speech.[19]

Second, this Article does not aim to resolve questions about specific canons of interpretation. It is arguable that some statutory canons may not properly carry over to the context of presidential directives, or that this

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14 *See* Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255, 260-61 (2000) (prioritizing "pre-promulgation materials" over an agency's "post-promulgation views" in deciphering the intent behind a regulation); Jennifer Nou, *Regulatory Textualism*, 65 DUKE L.J. 81, 84 (2015) (theorizing that regulatory interpretation should "focus[] on the public meaning of the rule's legally binding text"); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 360-62 (2012) (advocating a "purposive" method because regulations require "statement[s] of basis and purpose").

15 *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 111 (1995) (critiquing judicial attempts to determine the "popular intent" behind statutes passed through voter initiatives).

16 *See* Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2168 (2017) (advocating interpreting the Federal Rules of Civil Procedure through an administrative law framework).

17 *See* Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2318 (2006); *see also infra* Part IV.

18 *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

19 Notably, this Article addresses *judicial* interpretation of presidential directives. Accordingly, the Article focuses on the subset of presidential directives that reach the courts. Many directives do not go to court—perhaps because they address national security matters (and are therefore classified) or they do not affect private parties in a way that creates an Article III case or controversy. Such directives will likely be interpreted solely by executive officials. Much of this Article's analysis should inform the way in which executive officials perform that interpretive task. But nonjudicial interpretation of presidential directives may also raise distinct issues. For now, I bracket the issue of nonjudicial interpretation and hope to address it in future work.

arena calls for adjustments or even different canons.[20] Although this Article does not address those issues, the framework offered here—a focus on Article II and the institutional setting of the executive branch—should inform future work.

The analysis proceeds as follows. Part I lays important groundwork, describing presidential directives and the tendency of courts to treat directives as statutes. The Part argues that courts have largely overlooked the very different institutional contexts of Congress and the presidency. Parts II and III offer an Article II-based theory of interpreting presidential directives, arguing that the constitutional structure and the distinct institutional setting of the executive branch point toward textualism. Finally, Part IV suggests that the process for issuing presidential directives points toward some (perhaps unexpected) constraints on presidential power.

I. PRESIDENTIAL DIRECTIVES IN COURT: A LACK OF THEORY

Presidential directives have received surprisingly little attention in the legal academic literature. Accordingly, to frame the discussion, this Part provides some needed background. The Part then moves to the central point: federal courts have repeatedly assumed—without analysis—that presidential directives should be interpreted like statutes. This Article contends, however, that a theory for presidential directives must rest on Article II, not Article I.

A. *Definition and Brief Historical Background*

Presidents today issue a variety of directives—labeled as "executive orders," "proclamations," "memoranda," or simply "directives."[21] Although some early commentary sought to make sharp distinctions among these documents,[22] more recent commentators have recognized that Presidents

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20 For example, Justice Scalia and Bryan Garner argued that the "venerable principle that an ambiguity should be resolved against the party responsible for drafting the document . . . does not apply to governmental directives." SCALIA & GARNER, *supra* note 3, at 42. That may be sensible for statutes, but less so for presidential directives—at least when they impact government contractors or employees. *See* Cole v. Young, 351 U.S. 536, 556 (1956) (suggesting "[a]ny ambiguities" in an executive order that required the termination of disloyal employees "should . . . be resolved against the Government").

21 PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 16, 172-75, 208-09 (2d ed. 2014); *see* Stack, *supra* note 1, at 546-47 (noting that "American law provides no definition of executive orders" and that there are no "legal requirements on the types of directives that the president must issue as an executive order").

22 *See, e.g.*, H. COMM. ON GOV'T OPERATIONS, 85TH CONG., EXECUTIVE ORDERS AND PROCLAMATIONS: A STUDY OF A USE OF PRESIDENTIAL POWERS 1 (Comm. Print 1957) (suggesting executive orders are "directed to" executive officials, while proclamations are aimed at private conduct).

often use these devices interchangeably.[23] President Trump's recent directives illustrate this point. The first two versions of the travel ban were "executive orders,"[24] while the third was a "proclamation."[25]

As discussed below (in Part II), the label does affect, to some degree, the *procedure* through which the directive is created or revised.[26] But a President may seek to fulfill the same policy through an executive order, proclamation, memorandum, or other device. Accordingly, at the outset, this Article defines a presidential directive broadly as any directive that requires, authorizes, or prohibits some action by executive officials.[27]

Notably, these directives have a lengthy historical pedigree. Presidents have issued pronouncements to their subordinates since the days of George Washington.[28] But while those early directives did at times wind up in court, most nineteenth-century litigation dealt with the validity of the presidential directive at issue (that is, whether it was consistent with the Constitution or a federal statute).[29] Questions of meaning were, at best, in the background.

My research suggests that the federal judiciary dealt more regularly with cases involving the meaning of presidential directives beginning in the early twentieth century.[30] That is likely because the number of directives

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23 *See, e.g.*, GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS 7 (2013) (describing how government officials treat executive orders and proclamations "as being very similar, if not interchangeable"); *see also* Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order, 24 Op. O.L.C. 29, 29 (2000) [hereinafter O.L.C., Legal Effectiveness] ("[T]here is no substantive difference in the legal effectiveness of an executive order and [other] presidential directive[s.]").

24 *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter Travel Ban Version One] (titled "Protecting the Nation From Foreign Terrorist Entry Into the United States"); Exec. Order No. 13,780, 82 Fed. Reg. 13209 (Mar. 6, 2017) [hereinafter Travel Ban Version Two] (same).

25 *See* Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017) [hereinafter Travel Ban Version Three] (titled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats").

26 The Office of Management and Budget oversees the creation of an executive order or proclamation, while other White House sections handle other types of directives. *See infra* Section II.B.

27 *Accord* MAYER, *supra* note 11, at 4 ("Executive orders are . . . presidential directives that require or authorize some action within the executive branch . . . ."); DODDS, *supra* note 23, at 10.

28 *See* DODDS, *supra* note 23, at 90-119 (providing a historical survey of early presidential directives, including Washington's Neutrality Proclamation of April 1793 and Lincoln's Emancipation Proclamation).

29 *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 177-78 (1804) (concluding that President John Adams exceeded his statutory authority by ordering the seizure of vessels); *see also* DODDS, *supra* note 23, at 54-85 (discussing nineteenth-century judicial decisions, which focused on the validity of the directive at issue); *infra* note 30 and accompanying text (discussing my research).

30 With the help of research assistants, I conducted Westlaw searches and looked at hundreds of cases. It was clear that the bulk of disputes over meaning arose beginning in the early twentieth century. The search terms included: adv: TE("executive order" /s interp! or constru! or mean!); adv:

skyrocketed around that time, starting with the presidency of Theodore Roosevelt.[31] As political scientists have reported, Roosevelt issued almost as many directives as all of his predecessors combined.[32] The rise in litigation may also reflect the increasing significance of these directives.[33] Presidents began to make policy on matters ranging from labor disputes, conservation,[34] and civil rights[35] to national security[36] and war.[37]

B. *Presidential Directives as Statutes?*

Over the past century, the federal judiciary has grappled with various interpretive questions surrounding presidential directives. The questions of meaning include, for example, what qualifies as an environmental

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TE("president! proclam!" /s interp! or constru! or mean!); adv: TE("president! memorand!" /s interp! or constru! or mean!).

31 *See* DODDS, *supra* note 23, at 121 ("[Roosevelt] was the first president to regularly use unilateral directives for major policy purposes."). The greatest spike was during the 1930s and 1940s—the time of the Great Depression and World War II. *See id.* at 162 (noting that Franklin Roosevelt issued 3,522 executive orders, "far more than any president before or since"). Presidents today still issue significant directives at a high rate. *See* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION 83 (2003) (reporting, based on an empirical study, that the number of significant directives increased beginning in the mid-twentieth century).

32 *See* DODDS, *supra* note 23, at 121 (calculating that Theodore Roosevelt issued 1,081 orders while in office, while his predecessors had issued a combined total of 1,262).

33 *See* HOWELL *supra* note 31, at 84 ("The rise of significant executive orders reflects the general growth of presidential power in the modern era." (citation omitted)); Alexander Bolton & Sharece Thrower, *Legislative Capacity and Executive Unilateralism*, 60 AM. J. POL. SCI. 649, 656 (2016) (asserting that nineteenth-century orders "tended to be more ceremonial and less substantively broad").

34 *See* DODDS, *supra* note 23, at 124-51 (discussing Theodore Roosevelt's executive orders pertaining to labor conflicts, the eight-hour government workday, forest reserves, and wildlife refuges).

35 *See* Exec. Order No. 11,375, 32 Fed. Reg. 14303, 14303 (Oct. 13, 1967) (establishing a directive to provide for equal employment opportunities for federal employees); Exec. Order No. 11,246, § 202, 30 Fed. Reg. 12319, 12320 (Sept. 24, 1965) (barring discrimination and requiring affirmative action by government contractors on the basis of "race, creed, color, or national origin"); *see also* Exec. Order No. 10,925, § 301, 26 Fed. Reg. 1977, 1977 (March 6, 1961) (banning discrimination by government contractors with respect to "race, creed, color, or national origin"); RUTH P. MORGAN, THE PRESIDENT AND CIVIL RIGHTS: POLICY-MAKING BY EXECUTIVE ORDER 46-50 (1970) (discussing Exec. Order No. 10,925 as President Kennedy's "first major civil rights move").

36 *See* subsection III.B.2.a (discussing orders issued under the International Emergency Economic Powers Act blocking transactions with countries that posed threats to national security).

37 *See, e.g.*, Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942) (authorizing the exclusion of "any person" from designated "military areas").

"emergency";[38] which arrangements count as government contracts;[39] whether a directive creates a private right of action;[40] whether a directive authorizes "back pay" in government-initiated actions,[41] and the meaning of terms like "banking institution,"[42] "transfer,"[43] and even "infant."[44] Courts have employed a variety of methods to interpret these directives. But one common theme emerges: federal courts have repeatedly asserted that presidential directives should be treated just like statutes.[45]

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38 *See* APWU v. Potter, 343 F.3d 619, 624-27 (2d Cir. 2003) (interpreting Exec. Order No. 12,580, § 2(e)(1), 52 Fed. Reg. 2923, 2924 (Jan. 23, 1987), which authorizes the Environmental Protection Agency to handle "emergency removal actions" and permits other agencies to handle "removal actions other than emergencies" under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980).

39 *See* Crown Cent. Petroleum Corp. v. Kleppe, 424 F. Supp. 744, 746-49 (D. Md. 1976) (holding that leases for oil and gas rights qualified as government contracts within the meaning of Exec. Order No. 11,246, §201, 30 Fed. Reg. 12319, 12319 (Sept. 24, 1965), which prohibits discrimination and mandates affirmative action by government contractors); *see also* United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 463-64 (5th Cir. 1977) (concluding that a public utility qualified as a government contractor for purposes of Exec. Order No. 11,246), *vacated on other grounds by* 436 U.S. 942 (1978).

40 Most courts have found that presidential directives do not create private rights of action. *See, e.g.*, Helicopter Ass'n Int'l, Inc. v. FAA, 722 F.3d 430, 439 (D.C. Cir. 2013); Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1286 (9th Cir. 1987); Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 235-36 (8th Cir. 1975); Farkas v. Tex. Instrument, Inc., 375 F.2d 629, 632-33 (5th Cir. 1967).

41 *See* United States v. Duquesne Light Co., 423 F. Supp. 507, 508-10 (W.D. Pa. 1976) (holding that Exec. Order No. 11,246, 30 Fed. Reg. 12319 (Sept. 24, 1965), implicitly authorized back pay).

42 *See* Propper v. Clark, 337 U.S. 472, 480-82 (1949) (holding that an association of musical composers was a "banking institution" under the definition in Exec. Order 8785, 6 Fed. Reg. 2897 (June 14, 1941)).

43 *See* Zittman v. McGrath, 341 U.S. 471, 472-74 (1951) (holding that an attachment levy was not a "transfer" within the meaning of Exec. Order 8785, 6 Fed. Reg. 2897 (Jun 14, 1941)).

44 *See* United States v. Best & Co., 86 F.2d 23, 23-24, 28 (C.C.P.A. 1936) (holding that a presidential proclamation, which placed an extra import duty on "infants' outerwear," applied to wool knit sweaters that were designed for children between the ages of two and six).

45 *See, e.g.*, *Ex parte* Mitsuye Endo, 323 U.S. 283, 298 (1944) ("We approach the construction of [an executive order] as we would approach the construction of legislation in this field."); De Kay v. United States, 280 F. 465, 472 (1st Cir. 1922) ("In construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes . . . ."); Singh v. Gantner, 503 F.Supp.2d 592, 595-96 (E.D.N.Y. 2007) ("In the construction and interpretation of a statute or an Executive Order, accepted canons of statutory construction must be applied."); United States v. Abu Marzook, 412 F.Supp.2d 913, 922 (N.D. Ill. 2006) ("The Court interprets Executive Orders in the same manner that it interprets statutes."); *see also Utley*, 811 F.2d at 1284-86 (applying the *Cort v. Ash*, 422 U.S. 66 (1975), test for statutes, as well as "elemental canon[s] of statutory construction" in concluding that an executive order did not create an implied private right of action) (internal citations omitted); Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1199 (D. Utah 2004) ("The test used to determine whether a statute has been repealed is also used for an executive order.") (quoting Mille Lacs Band of Chippewa Indians v. Minnesota, 861 F.Supp. 784, 829 (D. Minn. 1994)). Relatedly, lower federal courts have assumed that the same severability rules apply to statutes and presidential directives. *See* Mille Lacs Band of Chippewa Indians v. Minnesota, 124 F.3d 904, 917 (8th Cir. 1997) ("The test for whether a valid portion of an otherwise unconstitutional

An early case vividly illustrates this assumption. One of the most notable decisions in interpretive history is *Holy Trinity Church v. United States*, where the Supreme Court advised that the "spirit" should prevail over the "letter" of a statute.[46] A federal court of appeals in *De Kay v. United States* extended this rationale to presidential directives.[47]

The *De Kay* case arose out of a rather unusual set of circumstances. A 1916 Supreme Court ruling (known as the "Killits decision") declared that federal courts lacked the common law power to suspend criminal sentences.[48] The Killits decision created quite a stir: Lower federal courts had suspended sentences for decades; an estimated 2000 individuals had benefited from such grace.[49] Would those people now have to be resentenced and possibly sent to jail? The Supreme Court anticipated these concerns, suggesting in its decision that a "complete remedy may be afforded by the exertion of the pardoning power."[50]

President Woodrow Wilson soon responded, issuing a proclamation that granted what some described as an "unprecedented . . . blanket pardon."[51] Wilson "grant[ed] a full amnesty and pardon to all persons under suspended sentences of United States courts . . . *and to all persons, defendants in said courts,*

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statute can be severed also applies to executive orders."); *In re* Reyes, 910 F.2d 611, 613-14 (9th Cir. 1990) (applying the statutory standard to an executive order); *see also* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 191 (1999) (assuming, without deciding, that "the severability standard for statutes also applies to Executive Orders"). I found only two decisions that clearly questioned the assumption that presidential directives should be treated like statutes. In the first, the court recognized that its own precedents treated executive orders like statutes and followed suit. *See* City and Cty. of San Francisco v. Trump, 897 F.3d 1225, 1238 (9th Cir. 2018). In the second, the court was primarily concerned with the validity of the executive order at issue. *See* Am. Fed'n of Gov't Emps., AFL-CIO v. Reagan, 665 F. Supp. 31, 34 (D.D.C. 1987) ("[T]here are no established principles of interpretation for Executive Orders . . . ."), *rev'd on other grounds*, 870 F.2d 723, 724 (D.C. Cir. 1989) (upholding the executive order and not commenting on any interpretive questions). Both decisions did, at least, acknowledge the need for interpretive principles in this area.

46 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."). In that case, the Court held that the Alien Contract Labor Act of 1885, which by its terms barred "labor or service of any kind" by "any foreigner," applied only to "cheap, unskilled labor"; thus, the Holy Trinity Church could retain the services of an English pastor. *See id.* at 458-65, 472 ("[T]he intent of Congress was simply to stay the influx of . . . cheap unskilled labor.").

47 280 F. 465 (1st. Cir. 1922).

48 *Ex parte* United States (*Killits*), 242 U.S. 27, 42, 51-53 (1916). The case was associated with Judge Milton Killits, whose decision was subject to mandamus review. *See* Ernest Morris, *Some Phases of the Pardoning Power*, 12 A.B.A. J. 183, 185 (1926).

49 *See* Charles L. Chute, *A Probation System in the United States Courts*, 11 VA. L. REG. 18, 19 (1925) ("Previous to this decision, a great many Federal judges had suspended sentence[s] . . . .").

50 *Ex parte* United States, 242 U.S. at 52.

51 *See* Chute, *supra* note 49, at 19 ("President Wilson did the unprecedented thing of issuing a blanket pardon to these men and women. Had he not done so, all . . . would have had to be returned to court for sentenc[ing].").

in cases where pleas of guilty were entered or verdicts of guilty returned prior to June 15, 1916, and *in which no sentences have been imposed*."[52]

Meanwhile, in April 1915, Henry De Kay and a banking associate were convicted of bank fraud.[53] De Kay was still in the process of challenging his conviction—and had not yet been sentenced—when President Wilson issued the "blanket pardon."[54] De Kay argued that the clemency extended to his case.[55] After all, the proclamation expressly applied "to all persons, defendants in [United States] courts, in cases where . . . verdicts of guilty [were] returned prior to June 15, 1916, and in which no sentences have been imposed."[56] De Kay was not sentenced until February 1920.[57]

The court of appeals announced that "[i]n construing the proclamation of the President the same rule of construction must be applied as in the construction of statutes."[58] "Applying the same rule of construction as was applied in *Church of the Holy Trinity*," the court held that, although De Kay's case "'may be within the letter of the statute,' it is 'not within its spirit.'"[59] The proclamation was "stated in general terms" but "must be restricted to the defendants" it was meant to benefit: those "whose sentences had been illegally suspended."[60] In short, De Kay was out of luck.[61]

In subsequent years, courts continued to assume that presidential directives should be treated like statutes.[62] To be sure, this assumption does not resolve interpretive disputes. Although the Supreme Court has moved away from *Holy Trinity*, the Court has not adopted a single method of statutory interpretation, much less sought to make that approach precedential.[63] The approach to

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52 Proclamation on Amnesty and Pardon (June 14, 1917), *in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8317 (New York, Bureau of National Literature, 1921) (emphasis added).

53 De Kay v. United States, 280 F. 465, 465-66 (1st Cir. 1922).

54 *Id.* at 471.

55 *Id.* at 465-66, 471-72.

56 *Id.* at 473 (internal quotations omitted).

57 *See id.* at 472 (noting that on February 6, 1920, De Kay was sentenced to a five-year prison term).

58 *Id.*

59 *Id.* at 473 (quoting Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)).

60 *Id.*

61 *See id.* at 473-74.

62 *See supra* note 45 (collecting cases).

63 *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754, 1757-78 (2010) ("Methodological stare decisis . . . is generally absent from federal statutory interpretation . . . ."); *see also* Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1870 (2008) (arguing that "as a matter of policy, courts should give extra-strong stare decisis effect to doctrines of statutory interpretation"). Although the Court pays more attention to the text than it did in the past, the Court has not formally adopted "textualism." *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 115, 130-131.

statutes is even more "eclectic" in the lower federal courts, which hear the bulk of interpretive questions surrounding presidential directives.[64] But I argue that this assumption presents not only a practical but also a theoretical challenge. To the extent one believes that constitutional theory and institutional considerations should inform interpretive method (as many scholars do), presidential directives should be treated as distinct instruments. In short, presidential directives are not statutes.

C. *The Relevance of Structure and Institutional Setting: Lessons from Statutory Debates*

As Jerry Mashaw and others have observed, "[a]ny theory of statutory interpretation is at base a theory about constitutional law."[65] In debates over statutory interpretation, scholars focus (appropriately enough) on the constitutional provisions governing Congress—primarily Article I.[66] Statutory theorists are also attentive to the subconstitutional rules and procedures governing Congress (like committee hearings and the Senate

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64 As scholars have demonstrated through meticulous empirical studies, lower courts do not have "a single approach" to statutory interpretation but rather display "intentional eclecticism." Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298, 1302, 1353 (2018); *see* Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 66 (2018) (confirming that "lower courts' interpretive methods remain eclectic"). My research suggests that judges today approach presidential directives with a similar degree of "eclecticism."

65 Mashaw, *supra* note 6, at 1686; *see also* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 133 (2011) ("[Lawyers interpreting statutes] must decide . . . what division of political authority among different branches of government and civil society is best, all things considered."). Notably, not all theorists agree with this point. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 909 (2003) ("The Constitution cannot plausibly be read to say a great deal about . . . statutory interpretation."). Adrian Vermeule has advocated a version of textualism based primarily on concerns about the (limited) institutional capacities of the federal judiciary. *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 4-5, 150, 181, 186-87 (2006).

66 To be sure, statutory theories do not focus exclusively on Article I. Some debates over statutory interpretation emphasize (at least in part) the meaning of the Article III judicial power. *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 993-95, 997, 1087 (2001) (arguing that "the original materials surrounding Article III's judicial power assume an eclectic approach to statutory interpretation, open to understanding the letter of a statute in pursuance of the spirit of the law and in light of fundamental values"); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 6-8 (2001) (arguing that the "evidence of the original understanding of 'the judicial Power' in America is mixed, but ultimately it does not support the equity of the statute," that is, the idea that "the judicial power 'to say what the law is' originally encompassed an *inherent* equitable power to reshape statutes without regard to legislative intent"). Ryan Doerfler has advocated a "'conversation' model of interpretation" that draws on due process principles of fair notice. *See* Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1032-34, 1042-43 (2017).

filibuster). We can see this point vividly in recent debates over textualism and the use of legislative history.

Significantly, these statutory debates reflect an important (if at times implicit) assumption underlying interpretive theory: the process for creating a document tells us a good deal about the nature of that document and should thus inform interpretive method. As I argue below, this assumption underscores the importance of looking at the distinct institutional setting of presidential directives.

Notably, statutory interpretive theory has long been based on assumptions about the legislative process. For example, legal process purposivism urged interpreters to assume that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[67] Under this approach, interpreters should discern the primary purpose underlying a statute and do their best to carry out that purpose in individual cases.[68] Beginning in the 1980s, however, legal scholars (influenced by public choice theory) built important interpretive theories based on a less rosy picture of the lawmaking process.[69]

Modern statutory textualism arose out of these interpretive debates.[70] Statutory textualists view the legislative process as a means to protect the interests of political minorities. As textualism's leading defender John Manning has emphasized, the bicameralism and presentment process of Article I, Section 7, creates a supermajority requirement for every piece of legislation.[71] These procedures thus also—especially when supplemented by specific rules like the filibuster and committee gatekeeping—grant "political minorities extraordinary power to block legislation or insist upon

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67 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

68 *See id.* at 1374 (advising that a court should "[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can," although a court ought never to "give the words [of the statute] . . . a meaning they will not bear").

69 *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1533 (1987) ("A model of dynamic statutory interpretation . . . would help to ameliorate some of the biases attendant to the legislative process."); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226 (1986) (noting that "traditional methods of statutory interpretation" can "encourage[] passage of public-regarding legislation and impede[] passage of interest group bargains").

70 Notably, early textualists drew heavily on public choice theory. *See* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1289-90 (2010) (discussing this history and arguing that textualists gradually moved away from such a pessimistic vision of congressional lawmaking).

71 *See* U.S. CONST. art. I, § 7; Manning, *supra* note 66, at 74-75. Statutory textualism has been most forcefully defended by John Manning. But earlier theories also emphasized the Article I lawmaking process. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 25 (1997); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 539 (1983) ("Under article I . . . support is not enough . . . . If the support cannot be transmuted into an enrolled bill, nothing happens.").

compromise as the price of assent."[72] Statutory textualists argue that judges respect the "procedural rights" of political minorities by adhering to the specific provisions of the text.[73]

Textualists' assumptions about the legislative process also inform their view of legislative history. For example, textualists worry that legislators might manipulate the legislative record—intentionally inserting something that they could not convince their colleagues to enact into law.[74] At a minimum, textualists suggest, committee reports and floor statements are likely to be unreliable evidence of the statutory deal.[75] Accordingly, reliance on legislative history could undermine the protections for political minorities.[76]

Recently, scholars and jurists have challenged modern statutory textualism with competing theories of Article I and the lawmaking process.[77] In a nutshell, this commentary suggests that textualists "misunderstand

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72 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 77 (2006) [hereinafter Manning, *What Divides?*]; *see also* Manning, *supra* note 70, at 1314 ("The legislative procedures adopted by each House . . . accentuate" the protections for political minorities).

73 *See* Manning, *What Divides?*, *supra* note 72, at 77 ("[T]extualists believe that adjusting a statute's semantic detail unacceptably risks diluting that crucial procedural right."). Proposed legislation may be subject to a Senate filibuster. Under Rule 22, a cloture motion to end debate on the measure requires three-fifths of the Senate (sixty votes). *See* C. Lawrence Evans, *Politics of Congressional Reform*, *in* THE LEGISLATIVE BRANCH 490, 510 (Paul J. Quirk & Sarah A. Binder eds., 2005). For a discussion of the role of committees as gatekeepers, see John R. Boyce & Diane P. Bischak, *The Role of Political Parties in the Organization of Congress*, 18 J.L. ECON. & ORG. 1, 1-3 (2002) (discussing how legislation may get blocked by congressional committees).

74 *See* SCALIA, *supra* note 71, at 34 ("[T]he more courts have relied upon legislative history, the less worthy of reliance it has become."); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994) ("[Legislative history is] slanted, drafted by the staff and perhaps by private interest groups.").

75 *See* SCALIA & GARNER, *supra* note 3, at 376; Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 364-66 (2005).

76 *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675, 719 (1997) (allowing Congress to specify details in the legislative history "threat[ens] . . . the constitutional safeguards of bicameralism and presentment"). Notably, textualists do not foreclose all reliance on legislative history. *See* SCALIA & GARNER, *supra* note 3, at 382 (recognizing that courts might look to legislative history to determine the meaning of a technical term); John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559, 570-71 (2016) (same).

77 Notably, a number of scholars have powerfully responded to the constitutional and institutional assumptions of modern textualism. *See, e.g.*, Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 56-59 (2006) (arguing that textualists focus too much on "the constitutionally prescribed lawmaking procedures" at the expense of other separation of powers principles, including the judiciary's role in blocking "unwise or unjust government action"); *see also* Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 120 (2009) (arguing that textualism has a tendency to become "progressively more radical and, therefore, less workable" over time). The discussion in this Section does not aim to be comprehensive.

Congress."[78] According to these commentators, interpreters can often best discern what lawmakers believed they were doing (including any compromises that they reached) by looking to sources outside the text. Thus, while textualists emphasize Article I, Section 7, Judge Robert Katzmann and Victoria Nourse point to Article I, Section 5, which grants each house the power to craft "the Rules of its Proceedings."[79] Each house has exercised that power to delegate matters—such as the drafting of legislation—to committees, which then prepare reports for the entire body.[80] Some empirical work suggests that "members [of Congress] are more likely to vote . . . based on a reading of the legislative history than on a reading of the statute itself."[81] In other words, legislative history may very well be the *best* evidence of the statutory deal. Accordingly, as Abbe Gluck and Lisa Bressman argue, "[i]f one were to construct a theory of interpretation based on how members themselves engage in the process of statutory creation, a text-based theory is the *last* theory one would construct."[82]

This Article does not aim to resolve which theorists have the better argument as to statutory interpretation. Instead, I highlight these debates for two reasons. First, they underscore the extent to which interpretive theory depends on both constitutional structure and institutional setting. Second, they show that, for statutes, the emphasis is—as it should be—on the provisions and procedures governing Congress. This theoretical debate thus suggests that any theory for presidential directives should focus on the constitutional provisions and procedures governing the President.

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78 I borrow this phrase from Victoria Nourse's illuminating work on statutory interpretation. *E.g.*, Nourse, *supra* note 6, at 1136. Notably, Nourse believes that many current theories—not simply textualism—misunderstand Congress. She urges all interpreters to learn more about congressional procedure. *See* VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 7, 8-9, 15, 17, 64-95 (2016).

79 U.S. CONST. art. I, § 5, cl. 2.

80 *See* ROBERT A. KATZMANN, JUDGING STATUTES 9-13, 48 (2014) ("Congress intends that its work should be understood through its established institutional processes and practices"); NOURSE, *supra* note 78, at 12, 161-81 ("Article I, section 5, the Rules of Proceedings Clause, supports the constitutionality of legislative evidence.")

81 Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905-06, 968 (2013) (drawing on a survey of 137 congressional staffers responsible for drafting legislation). This work built on the pioneering study of Victoria Nourse and Jane Schacter, who interviewed sixteen staffers on the Senate Judiciary Committee. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576-79 (2002). One limitation of these studies is that the authors talked to staffers rather than members of Congress. *Id.* at 579; *see also* John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1936 n.151 (2015) (questioning Gluck and Bressman's choice to interview staffers when they are not the ones with "the power to enact legislation").

82 Gluck & Bressman, *supra* note 81, at 969.

II. AN ARTICLE II-BASED THEORY

The Constitution does not mention, much less spell out a procedure for creating, presidential directives. Nor does any federal statute prescribe an approach; the Supreme Court has held that the Administrative Procedure Act does not apply to the President.[83] But I argue that Article II, particularly the Opinions Clause, gives the President considerable discretion to structure his decisionmaking process. Since at least the 1930s, Presidents have used that power to invite executive officials to draft, negotiate over, and redraft directives.

This interagency consultation process has important implications for interpreting presidential directives. Although the President alone is responsible for the final decision, many directives do not reflect his preferred substantive policy. The President may opt, after consultation, to split the difference among agencies. I argue (in Part III) that courts can best give effect to the structure the President has created—with its possibility for compromise and less-than-effective directives—by hewing closely to the text.

A. *The Opinions Clause and Presidential Decisionmaking*

One assumption of interpretive theory is that we can learn a great deal about the nature of a document—and thus the proper approach to interpreting that document—by understanding the process by which it is created.[84] Although neither the Constitution nor any federal statute prescribes a process for crafting presidential directives, I argue that a rarely-emphasized provision of Article II empowers the President to institute such a procedure: the Opinions Clause. The Clause provides that the President

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83 *See* Franklin v. Massachusetts, 505 U.S. 788, 796, 800-01 (1992) (holding that "textual silence is not enough to subject the President to the provisions of the APA"); *see also* Dalton v. Specter, 511 U.S. 462, 476 (1994) (holding that "[t]he actions of the President cannot be reviewed under the APA because the President is not an 'agency' under" the APA). Although *Franklin* focused on arbitrary and capricious review, courts and commentators have found or assumed (reasonably enough) that presidential directives are exempt from the procedural requirements as well. *See* Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 318 (2006) [hereinafter Stack, *The President's Statutory Powers*] (noting that while "executive agencies must comply with the APA's procedural requirements," the President need not do so); *accord* Adam J. White, *Executive Orders as Lawful Limits on Agency Policymaking Discretion*, 93 NOTRE DAME L. REV. 1569, 1569 (2018). Indeed, this "procedural exemption" may be the most important implication, given that plaintiffs can challenge many presidential directives by suing the enforcement official under the APA. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018) (permitting, albeit without discussion of the plaintiffs' cause of action, a suit "challeng[ing] the application of [the] entry restrictions" in the third travel ban); Kevin M. Stack, *The Reviewability of the President's Statutory Powers*, 62 VAND. L. REV. 1171, 1194 (2009) (establishing that plaintiffs can "in almost all cases" sue "the subordinate federal official who acts upon the President's directive").

84 *See supra* Section I.C (discussing statutory debates).

"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."[85]

As background, I offer a brief overview of the literature on the Opinions Clause. To the extent scholars have discussed this provision, they have often focused on what the Clause says about *other* parts of Article II. Some scholars argue that the Opinions Clause undermines a central tenet of unitary executive theory.[86] Unitarians assert that, by "vest[ing]" the "executive Power" in the President, Article II grants him control over all discretionary executive action, free from congressional interference.[87] Skeptics respond that if the Vesting Clause were that broad, the Opinions Clause would be superfluous; a President with unlimited authority over the executive branch could presumably "require the Opinion, in writing" of his subordinates.[88]

A few scholars have identified a more affirmative function for the Opinions Clause. At least if one accepts that Congress has some power to structure the executive branch, the Opinions Clause places an important constraint on that power.[89] Peter Strauss and Cass Sunstein have suggested that the Opinions Clause ensures that the President may "consult with and

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85 U.S. CONST. art. II, § 2, cl. 1; *see also* Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 647 (1996) (describing the provision as "one of the least discussed but most intriguing clauses of the United States Constitution").

86 *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 33 (1994) (arguing that to read the Opinions Clause as "something more than a redundancy," one must assume "a vastly narrower conception" of presidential power than unitary executive theory); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2035 (2011) (discussing how the Opinions Clause casts doubt on the notion that "Article II's Vesting Clause confers illimitable presidential removal power").

87 U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."); *see* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992) ("Unitary executive theorists . . . . conclude that the President alone possesses *all* of the executive power.").

88 *See supra* note 86. Unitarians have offered answers to this challenge but have also acknowledged that the Opinions Clause may well be redundant. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 585 (1994) (suggesting that the Clause may prevent the President from demanding an opinion on "personal legal problems"); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 30-31 (arguing that the Clause is redundant but still important because it deters Congress from passing a statute directing officials to report to Congress, rather than the President). In recent work, Sai Prakash has argued that the inclusion of the Opinions Clause served a *political* function by reassuring early Americans, who were accustomed to executives with "councils," that "the president would not lack for advice." SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 194 (2015); *see also infra* notes 106–109 and accompanying text (discussing those early councils).

89 Akhil Amar has offered an account that would be consistent with many views of Article II. He suggests that the Opinions Clause prohibits the President from "requir[ing]" opinions from other branches—most notably, the judiciary. *See* Amar, *supra* note 85, at 655-56.

demand answers" from agency officials, so that he can evaluate their actions.[90] Under this view, the Clause provides a crucial mechanism for the President to oversee lower-level officials in both the executive and the independent agencies, without interference from Congress.[91]

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90 *See* Neil Thomas Proto, *The Opinion Clause and Presidential Decision-Making*, 44 MO. L. REV. 185, 201 (1979) ("[T]he Opinion Clause is an affirmative power" that ensures the President may "gather[] the information . . . necessary to control and direct the energy and resources of the executive branch."); Peter L. Strauss & Cass R. Sunstein, *The Role of the President and OMB in Informal Rulemaking*, 38 ADMIN. L. REV. 181, 197, 200 (1986) (noting that the Opinions Clause grants the President a "procedural" power to "control and supervise" officials, without congressional interference); *see also* Ronald J. Krotoszynski, Jr., *Cooperative Federalism, The New Formalism, and the Separation of Powers Revisited:* Free Enterprise Fund *and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1642 (2012) ("[T]he Opinions Clause supports the claim that the president must enjoy the ability to oversee the execution of federal law . . . ."). Notably, as Professor Strauss has underscored in other work, the Opinions Clause allows the President to get information from—and thereby check up on—officials; the Clause does *not* indicate that the President may instruct federal officials to disregard a statutory duty. *See* Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 727 (2007) (emphasizing that the Opinions Clause does not authorize the President to "keep . . . officers from performing any such duty as the Congress may statutorily have assigned to them (and not to him)"). Relatedly, scholars have debated whether statutes that confer power on agency officials should be construed to permit the President to direct the actions of those officials. *Compare* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2251 (2001) (arguing that the President should presumptively have such authority over officials in executive agencies), *with* Stack, *The President's Statutory Powers*, *supra* note 83, at 267 (contending that "the President has directive authority . . . only when the statute expressly grants power to the President in name"). This Article takes no position on that question of statutory interpretation.

91 *See* Strauss & Sunstein, *supra* note 90, at 200 (arguing that this procedural supervisory power extends to both executive and independent agencies). A federal agency is typically considered "independent" if the President cannot remove the agency's leaders at will. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 492 (1987). It seems to be an open question whether the Opinions Clause permits the President to demand opinions from the leaders of independent agencies. In separate (and later) work, Cass Sunstein along with Larry Lessig suggested (tentatively) that the Opinions Clause may not apply to "nonexecutive" agencies. *See* Lessig & Sunstein, *supra* note 86, at 35-36; *cf.* U.S. CONST. art. II, § 2, cl. 1 ("[The President] may require the Opinion . . . of the principal Officer in each of the *executive* Departments") (emphasis added). But as Martin Flaherty has pointed out, that argument relies on an assumption that individuals at the Founding made a sharp distinction between "executive" and "nonexecutive" departments. Flaherty persuasively argues that is unlikely. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1796 (1996); *see also* PRAKASH, *supra* note 88, at 200 (arguing the term "*executive* departments" simply underscored that the President could not demand opinions from the Chief Justice—as had earlier drafts (emphasis added)). Accordingly, I agree with other scholars that the Clause is most reasonably read to apply to both types of agencies. *See* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING (forthcoming Nov. 2020) (manuscript at 63-64, 193) (on file with author) (stating that the Opinions Clause applies to both the independent and the executive agencies and limits Congress's power to make top officials "independent of presidential oversight"); J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2134 & n.239 (1989) (noting that Presidents may in effect delegate to and order independent agencies as well as executive agencies); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 646 (1984) (citing as supporting

But I argue that the Opinions Clause does not simply provide the President with a tool to check up on his subordinates. The provision also invites the President to seek advice and counsel—an "Opinion, in writing"—from officials, so that he can make a more informed decision.[92] Indeed, the text of the Clause suggests that the information-gathering function may be its primary purpose.[93] The provision authorizes the President to ask "principal Officer[s]" for advice about "any Subject relating to the Duties of their respective Offices"—that is, the precise issues on which the officials will have greater expertise.[94]

Other structural features of Article II provide some assurance that the President will listen to such advice. The Appointments Clause empowers the President to nominate those "principal Officers."[95] Although the Senate must confirm each nominee, "they cannot themselves choose—they can only ratify or reject the choice of the President," leaving him with the power to select an alternative.[96] One presumes that most Presidents select individuals who (the Presidents believe) will offer cogent and helpful advice. Along the same lines, to the extent that the President genuinely invites candor, his removal power will encourage a subordinate official to provide a candid opinion.[97]

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evidence that both Presidents and independent agencies have understood the Opinions Clause to cover independent agencies); *see also* Kagan, *supra* note 90, at 2324 (noting the scholarly consensus that the President may exercise a "'procedural' supervisory authority" over both types of agencies, and that the Opinions Clause may bar congressional interference).

92 U.S. CONST. art. II, § 2, cl. 1. A few scholars have recognized that the Clause serves this function, albeit with very little discussion. *See, e.g.*, Harvey C. Mansfield, *Reorganizing the Federal Executive Branch: The Limits of Institutionalization*, 35 LAW & CONTEMP. PROBS. 461, 463 (1970) (noting that one plausible purpose of the Clause was to "provide [the President] with informed advice"); *see also* PRAKASH, *supra* note 88, at 194 (noting the Clause enables the President to "demand opinions related to facts, law, and public policy so that he may make informed decisions about law execution, foreign affairs, and the military").

93 The origins of the Opinions Clause are "somewhat obscure." Lessig & Sunstein, *supra* note 86, at 33; *see also* Gary Lawson, *A Truism with Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 485 (2008) (describing the provision as "one of the seemingly strangest clauses in the original Constitution"). For a brief discussion of the history, see *infra* notes 106–109 and accompanying text.

94 U.S. CONST. art. II, § 2, cl. 1. Of course, as Akhil Amar has asserted, it seems likely that the President has discretion to determine *which* subjects relate to the duties of a given officer. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 326 (2012) (noting that the President may determine what is "so closely 'relat[ed] to' a given department head's official portfolio as to warrant a formal opinion").

95 *See* U.S. CONST. art. II, § 2, cl.2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States . . . .").

96 THE FEDERALIST NO. 66, at 405 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Senate "may defeat one choice of the Executive" but "could not be sure, if they withheld their assent, that the subsequent nomination would fall upon their own favorite").

97 *See* Myers v. United States, 272 U.S. 52, 176 (1926) (asserting that the President must have "unrestricted power" to remove federal officials); *see also* Humphrey's Executor v. United States, 295

Article II thus gives the President an important tool to learn from officials before he issues a directive—to invite them to *help him* ensure the faithful execution of the laws.[98] I argue that Presidents have exercised this power in structuring the decisionmaking process for presidential directives. As described in the next Section, Presidents have sought out considerable input from agency officials prior to issuing presidential directives. Agency officials draft, negotiate over, and redraft the text of a given directive—debating (and often disagreeing over) not only the best policy but also the means of effectuating that policy. In this way, Presidents gather information—advice on both whether to issue a directive and precisely what any such directive should say.

One might reasonably ask whether the Opinions Clause is a necessary source of power. That is, couldn't the President ask for advice, absent this provision? The answer depends in part on one's background assumptions about Article II. For unitary executive theorists, the Opinions Clause is unnecessary. The President's background "executive Power" would enable him to ask for opinions, absent interference from Congress.[99]

But for those with a less expansive view of presidential power, the Opinions Clause serves an important function—in two different respects. First, the Clause *ensures* that the President may seek advice from subordinates. That is, the provision places some constraint on Congress's power to interfere with that information-gathering function. (The Clause thus provides some support for the President's exemption from the procedural requirements of the Administrative Procedure Act.[100])

Second, the Opinions Clause makes clear that the President has no duty to engage in such consultation. The Clause, after all, states that he "*may* require" the written opinion of agency officials.[101] Accordingly, the President may also opt *not* to seek advice. In this way, the Opinions Clause differs from

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U.S. 602, 629, 631-32 (1935) (upholding "for cause" removal provisions for officials in independent agencies). If the President did *not* genuinely invite candor, of course, the official might worry about losing her job if she offered an "Opinion" that conflicted with the President's preferred position. But under the analysis here, that would be akin to a presidential decision not to seek out advice—a power that the President has under the Opinions Clause.

98 *Cf.* U.S. CONST. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

99 *See supra* notes 87–88 and accompanying text.

100 To the extent that Congress imposed a procedural scheme, that would arguably violate the President's power to structure the manner through which he seeks out information from subordinates. *Cf.* Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992) (establishing that absent "an express statement by Congress" the Court would not construe the APA to apply to the President); *supra* note 83. This Article does not, however, aim to resolve whether Congress could impose some kind of procedural scheme.

101 U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

the Take Care Clause, which provides that the President "*shall* take Care that the Laws be faithfully executed."[102] Although scholars debate whether the Take Care Clause imposes duties on the President,[103] I assume for present purposes that the Clause does impose certain obligations. Even if one makes that assumption,[104] the Opinions Clause clarifies that the President has an important choice of means in carrying out such duties: The President may, but need not, seek out advice from his subordinates in determining how to execute the laws.

The Constitution thus gives the President the choice to make an informed or ill-informed decision.[105] In this respect, the Opinions Clause differs markedly from analogous provisions in early state constitutions. Those state provisions not only invited governors to gather advice from an executive "council" but required the governors to obtain the "consent" or "approval" of the council before taking certain actions.[106] The federal Constitution created no such mandatory council.[107] The President has the discretion to seek as much, or as little, advice as he chooses from his subordinates.

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102 U.S. CONST. art. II, § 3 (emphasis added).

103 *Compare, e.g.*, Calabresi & Rhodes, *supra* note 87, at 1198 n.221 (asserting that "the Take Care Clause bolsters the power-grant reading of the Vesting Clause of Article II"), *with, e.g.*, Evan Caminker, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 377 (1989) ("[T]he [T]ake [C]are [C]lause is better understood as a directive that the President must execute the law consistently with Congress' will, rather than as a grant of exogenously defined power . . . ."); Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653, 670 (1985) (asserting that the Take Care Clause creates "a duty, not a license"). *See also* Tara Leigh Grove, *Standing Outside of Article III*, 162 U. PA. L. REV. 1311, 1322 n.41 (2014) (suggesting that "the Take Care Clause may be both a grant of power and the imposition of a duty").

104 *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1842, 1875-78 (2015) (relying in part on the Take Care Clause in arguing that "a duty to supervise [officials] represents a basic precept of our federal constitutional structure"); *see also* David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 72-73 (2009) ("[T]he Constitution imposes a duty upon the President and all other executive branch officials to obey the law . . . .").

105 *See also infra* Sections III.B.1, IV.A.

106 *See* PRAKASH, *supra* note 88, at 40-42 (discussing how under some state constitutions, certain "exercises of [gubernatorial] power required the 'advice,' the 'consent,' or the 'advice and consent' of a council"); *see also* AMAR, *supra* note 94, at 326 ("In sharp contrast to many state governors who constitutionally had to win the votes of council majorities for various proposed gubernatorial initiatives, the president would be his own man.").

107 The Opinions Clause grew out of proposals to create a "council" of advisors for the President. *See* MCCONNELL, *supra* note 91, at 57-58, 62-63 (discussing the proposals for an executive council); Flaherty, *supra* note 91, at 1796-98 (describing proposed councils comprising the Chief Justice of the Supreme Court, Secretaries for various departments, and leaders of the House and Senate). Interestingly, none of the proposals would have given the council veto power over any presidential decision. Flaherty, *supra* note 91, at 1796-98; *accord* MCCONNELL, *supra* note 91, at 57-58 (emphasizing that the Framers "reject[ed the] model of a council to advise and restrain the executive magistrate, which existed in almost all the states"); *see also* Proto, *supra* note 90, at 193-95 (tracing the Opinions Clause to proposals for a "council of state" and "Privy Council," whose opinions would not be binding on the executive). Ultimately, the entire "council" idea was

But this discretionary power also comes with an important corollary: Absent an executive council, the President must take responsibility for his (informed or ill-informed) decisions; he has no one to blame if things go wrong.[108] As Akhil Amar and others have underscored, the Opinions Clause "concentrate[s] accountability for presidential actions on the president himself."[109]

B. *The Interagency Consultation Process*

Article II gives the President considerable power to structure the process by which presidential directives are created. But the existing structure is largely unknown in the legal academic literature. This Article thus offers a window into that process—drawing on both political science research and my own interviews with executive branch officials from the Trump, Obama, George W. Bush, and other administrations.[110] Notably, these officials could not share details about particular directives. The process for crafting directives takes place almost entirely behind closed doors; the details are not publicly available for many years (if at all).[111] But the officials offered illuminating insights about the process itself.

A presidential directive may originate in one of two ways. The directive might be "top down": the President has a policy that he hopes to effectuate,

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abandoned—apparently in part out of a concern that the President would blame the council for bad decisions. Flaherty, *supra* note 91, at 1797.

108 *See supra* note 107. To be sure, Presidents may still attempt to shift blame to others. But the Opinions Clause is designed so as to make that more difficult: the President cannot claim that he was bound by the decision of an executive council.

109 AMAR, *supra* note 94, at 326-27 (arguing that "the animating spirit of the opinions clause" was "to concentrate accountability for presidential actions on the president himself" and that "the central purpose" of the Opinions Clause was "to prevent presidents from evading blame by hiding behind the opinions of advisers meeting in private"); *accord* MCCONNELL, *supra* note 91, at 57-58, 62-63 (discussing the Convention and Ratification debates over the Opinions Clause and emphasizing that the Founders sought to ensure the President's "responsibility to the people"); PRAKASH, *supra* note 88, at 194 ("[T]he word 'opinions' suggests that the ultimate decisions were the president's, not the principal officers'."); Flaherty, *supra* note 91, at 1798 (agreeing that the Opinions Clause "furthers presidential accountability"); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 628 (2009) ("[T]his structure was geared to ensure accountability . . . ."); Proto, *supra* note 90, at 194 (suggesting that the history behind the Clause shows "the President has singular and ultimate accountability for his own decisions").

110 *See supra* note 9 (listing interviewees).

111 *See* Andrew Rudalevige, *Executive Orders and Presidential Unilateralism*, 42 PRESIDENTIAL STUD. Q. 138, 147-48 (2012) (noting the Office of Management and Budget keeps a file on every executive order and that as of his 2012 article, "some executive order files [were] available up to late 1987").

so he asks an agency or White House official to draft a directive.[112] Alternatively, the directive might be "bottom up": an agency wants the executive branch to adopt a policy, but it lacks the authority to bind other agencies itself.[113] In either event, the directive tends to go through a fairly involved procedure.

1. Executive Orders and Proclamations

The process for issuing some directives—executive orders and proclamations—is guided by executive order.[114] Current officials still look to President John F. Kennedy's Executive Order 11,030.[115] But as political scientist Andrew Rudalevige has observed, the process—both on paper and on the ground—goes back much further.[116] Beginning in the 1930s, Presidents issued a series of executive orders creating an interagency consultation process that largely mirrors the process used today.[117] Moreover, Kennedy's Executive Order 11,030 and its predecessors supply only the basic outlines; many of the details discussed below are based on interviews or political science research. (The footnotes make clear the source of the information.)[118]

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112 *See* Egan Interview, *supra* note 9 (noting that sometimes the President "wants to take some action"); *see also* MAYER, *supra* note 11, at 61 ("[E]xecutive orders typically either originate from . . . the Executive Office of the President or percolate up from executive agencies desirous of presidential action.").

113 *See, e.g.*, Fonzone Interview, *supra* note 9 (indicating that an agency may ask for a directive, because the President can bind the entire executive branch); *see also* Rudalevige, *supra* note 111, at 153 (reporting that more than 6 out of every 10 executive orders in his study were initiated by federal agencies).

114 Notably, this process does not apply to "hortatory" directives that, as one former official put it, "simply announce 'National Tree Day.'" De Interview, *supra* note 9. Such directives go through a more streamlined process. *See* Exec. Order No. 12,080, 43 Fed. Reg. 42,235 (Sept. 18, 1978). Nor does the process apply to international agreements. *See* Exec. Order No. 11,030, § 5, 27 Fed. Reg. 5847, 5848 (June 19, 1962).

115 *See* Exec. Order No. 11,030, 27 Fed. Reg. at 5847. There have been some minor modifications. For example, President George W. Bush amended the order to reflect that directives were likely to be created by computer, rather than typewriter. *See* Exec. Order No. 13,403, § 1(a), 71 Fed. Reg. 28,543, 28,543 (May 12, 2006) (changing from "typewritten" to "prepared"); *see also* Exec. Order No. 12,608, § 2, 52 Fed. Reg. 34,617, 34,617 (Sept. 9, 1987) (noting a name change to "the Office of Management and Budget").

116 *See* Rudalevige, *supra* note 111, at 148 (noting that Franklin Roosevelt's Executive Order 6247 in August 1933 was the first that "created a standard process").

117 Under orders issued by Presidents Franklin Roosevelt and Truman, the Bureau of the Budget (the predecessor to the Office of Management and Budget) would review a proposed executive order or proclamation; send the draft to the Attorney General for "form and legality" review; and the resulting directive would be published in the Federal Register. Exec. Order No. 10,006, 13 Fed. Reg. 5927, 5927, 5929 (Oct. 9, 1948); Exec. Order No. 7298 (Feb. 18, 1936).

118 This Part first lays out the typical process for crafting various types of presidential directives and then discusses how Presidents sometimes deviate from these procedures. *See infra* subsection II.B.3.

a. *The Process*

Under Executive Order 11,030, the Office of Management and Budget (OMB) oversees the process for an executive order or proclamation.[119] Once OMB receives a draft directive (which, as noted, has often been written by agency officials),[120] OMB shares the draft with other agencies that may have an interest in the issue. Officials then offer feedback, commenting on both policy and legal matters. Agency officials will point out, for example, if a statute prohibits that agency from carrying out the directive in the suggested manner (or at all).[121]

Moreover, officials (and particularly legal counsel) often weigh in on the precise wording of the directive at issue.[122] Indeed, agency officials "pore[] over" these texts—and may get into "heated arguments over the use of a particular word"—because the resulting document could impact the power of the agency itself.[123] One former official remarked, "The more important the executive order, the more attention paid to the text."[124] Based on the feedback, OMB will redraft the directive and send it out again for comment. Former

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119 *See* Exec. Order No. 11,030, §2(a), 27 Fed. Reg. at 5847 (providing that the "Director of the Bureau of the Budget" should oversee the process). President Reagan later modified the order to reflect that the Bureau was renamed the Office of Management and Budget. Exec. Order No. 12,608, § 2, 52 Fed. Reg. at 34617.

120 *See supra* notes 112–113 and accompanying text. Kennedy's order specifically contemplates that agency officials will often draft the directive. *See* Exec. Order No. 11,030, § 2(a), 27 Fed. Reg. at 5847 (requiring the "originating Federal agency" to submit the draft to be reviewed).

121 *See* Bies Interview, *supra* note 9 (noting that agency officials raise both "policy-based" and "law-based" objections); Fonzone Interview, *supra* note 9 (reporting that the "coordination process" is designed in part to make sure the President has the legal authority to issue a directive).

122 *See* Egan Interview, *supra* note 9 (detailing how agencies "absolutely" argued about the text, explaining that "[t]he specific words do matter," and providing an example: the Secretary of State should act "in consultation with" the Treasury Secretary means the two should discuss the matter, while "in coordination with" means the Treasury Secretary has a "veto" over the decision); McGahn Interview, *supra* note 9 (stating that a great deal of care goes into the text, because agencies need guidance on what to do); Otis Interview, *supra* note 9 (noting that officials were "very careful" about the text); *see also* Luttig Interview, *supra* note 9 (recounting how lawyers tend to focus on the text).

123 Fonzone Interview, *supra* note 9 (asserting that the language is "pored over," particularly if the order would impact multiple agencies, and that "an incredible amount of work" goes in to "resolving differences" among agencies); Gray Interview, *supra* note 9 (reporting that "a lot of care would go into the drafting" of the text, "because this is like writing the law for the executive branch," and "[y]ou could get into heated arguments over the use of a particular word"); *see also* McGahn Interview, *supra* note 9 (agreeing that agencies debate the language, perhaps because they might be giving up power, or because they think they are better equipped to implement a given order).

124 Fonzone Interview, *supra* note 9; *see also* Gray Interview, *supra* note 9 (similarly noting that more care would be devoted to important directives).

officials suggested that many directives go through at least three drafts—and three rounds of comments—before leaving OMB.[125]

The President is not necessarily absent at this stage of the process. If a given directive is highly significant, then White House or Cabinet officials may ask the President to weigh in on a dispute among agencies.[126] But my research suggests that such direct presidential involvement is the exception rather than the rule. Agency officials debate most directives among themselves—with the oversight of OMB—and the President does not get involved until a final draft is ready for him to sign.

After the agency review, OMB sends the draft directive to the Department of Justice's Office of Legal Counsel (OLC) for "form and legality" review.[127] That is, OLC's job is to make sure the executive order or proclamation complies with the Constitution and any governing statutes or regulations.[128] Although there are debates about how searching a review OLC provides, at least some directives apparently get stopped (or modified) at this stage.[129]

The next stop in what one former official described as a "marathon" is the White House Staff Secretary.[130] Although this position is not well known,[131]

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125 *See* Egan Interview, *supra* note 9; *see also* Gray Interview, *supra* note 9 (indicating that there might also "be one or more meetings involving the agencies with the biggest interest to hash out differences").

126 *See* Gray Interview, *supra* note 9 (noting that "the President might get consulted part-way through" and he "would make a decision on contested points 1, 2, 3" but would "not be bothered a second or third time by appeals" from agency officials); *see also* Egan Interview, *supra* note 9 (asserting that the President "would almost certainly have been briefed and have opportunity to provide views" on an important directive).

127 *See* Exec. Order No. 11,030, § 2(b), 27 Fed. Reg. 5847, 5847 (June 19, 1962) (requiring the Attorney General to review "as to both form and legality"). The Attorney General has delegated this function to OLC. *See Office of Legal Counsel*, U.S. DEPARTMENT OF JUSTICE, https://www.justice.gov/olc [https://perma.cc/QK8W-NF64] (last visited Jan. 7, 2020) ("By delegation from the Attorney General, . . . the Office of Legal Counsel provides legal advice to the President and all executive branch agencies . . . . All executive orders and substantive proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality . . . .").

128 *See* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 359-65 (1993); *see also* Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 878 (2019) (noting OLC review "does not appear to require any sort of rigorous review of the facts underlying the order").

129 Kmiec, *supra* note 128, at 359 (noting "form and legality" letters "may be viewed by some, outside of OLC, as mere legal 'formalities,'" but disputing that notion); *see also* Luttig Interview, *supra* note 9 (reporting that during his time at OLC, he carefully reviewed each document, but stating that the OLC culture is to offer an "expansive understanding" of presidential power).

130 De Interview, *supra* note 9.

131 The position recently got attention, however, because the most recent Supreme Court nominee Brett Kavanaugh is a former Staff Secretary. *See* Jessica Gresko, *Senators Spar on Access to*

the Staff Secretary plays an integral role in the promulgation of every presidential document.[132] The Staff Secretary reviews the draft directive and often engages in another layer of consultation—this time, within the White House; the Staff Secretary checks to make sure that "relevant constituencies" within the Executive Office of the President are on board with the directive.[133] Finally (and possibly after some additional edits), the Staff Secretary sends the directive to the President.[134]

What does the President see? Notably, the President does not receive a copy of every comment by agency officials on earlier drafts of the directive. As a few former officials put it, the comments range from "thoughtful" to "crazy" or even "nonsense."[135] Instead, the President receives three documents: (1) the text of the directive; (2) OLC's "form and legality" certification; and (3) a memo (typically prepared by the Staff Secretary or another White House official) summarizing the interagency consultation process and any remaining points of disagreement—with a focus on "high-level objections" from Cabinet members or other top officials.[136] The President then opts to sign (or not sign) the directive.[137]

Kavanaugh's Staff Secretary Work, ASSOCIATED PRESS (July 27, 2018), https://apnews.com/4e272e40fe914e19a1d67212bae99056 [https://perma.cc/R42C-XX97].

132 *See* De Interview, *supra* note 9 (describing his work as Obama Staff Secretary); *Presidential Departments*, THE WHITE HOUSE, https://www.whitehouse.gov/get-involved/internships/presidential-departments [https://perma.cc/B48Y-HE6Y] (last visited Oct. 15, 2019) (describing the Staff Secretary as "the gate-keeper of paper flowing into and out of the Oval Office").

133 *See* De Interview, *supra* note 9 (noting that most of the "vetting" for executive orders happens through the interagency consultation process headed by OMB but, as Staff Secretary, he would also "mak[e] sure relevant constituencies in the White House" were "on board"); *see also* Bies Interview, *supra* note 9 (detailing how "OMB runs the agency clearance" process, while the "Staff Secretary runs White House clearance").

134 *See* De Interview, *supra* note 9.

135 *E.g.*, *id.* (reporting that the comments ranged from "thoughtful things" to "nonsense"); Egan Interview, *supra* note 9 (describing some comments as "crazy," some "not-so-crazy").

136 *See* De Interview, *supra* note 9; Gray Interview, *supra* note 9 (reporting that the President received the summary memo and "of course" would get the text "because that is what the [President] signs"); Egan Interview, *supra* note 9 (relating how the President receives the text of the order along with an "action memorandum" that describes only "high-level objections").

137 Former officials told me that the President typically signs the directive, although there are occasions when he will "kick it back." Gray Interview, *supra* note 9; *see also* Egan Interview, *supra* note 9. The text of the executive order or proclamation is then published in the Federal Register. Exec. Order No. 11,030, § 3, 27 Fed. Reg. 5847, 5848 (June 19, 1962); *see also* 44 U.S.C. § 1505(a) (2018) (requiring proclamations and executive orders with "general applicability and legal effect" to be published in the Federal Register).

b. *Examples*

A scuffle within the Carter Administration illustrates the negotiation process among agencies. As political scientist Kenneth Mayer recounts, there was a dispute among federal agencies over a draft executive order that would implement the National Environmental Policy Act (NEPA).[138] The main issue was whether (and the extent to which) the order should direct federal agencies to prepare environmental impact statements for actions in foreign countries.[139] Although the Council on Environmental Quality pushed for a broad order, a string of federal agencies—including the State Department, the Defense Department, and the Nuclear Regulatory Commission—insisted that NEPA should be limited to domestic conduct.[140]

Given the importance of the issue, President Carter weighed in during the agency review. Although Carter reportedly favored a broad interpretation of NEPA,[141] that is not the position he took. Instead, as Mayer explains, Carter opted to "split[] the difference" among the agencies.[142] The resulting directive—Executive Order 12,114—required environmental impact statements for some foreign actions but contained a number of restrictions and exemptions; for example, nuclear facilities were exempted, as the State Department had requested.[143]

Accordingly, President Carter made the ultimate decision to issue the directive. But the content was not his first-best policy choice. Nor was this an exceptional case. As Rudalevige recounts (based on detailed archival research of executive orders from the Truman through the Reagan Administrations, as well as data from the Clinton Administration), Presidents have often issued compromise orders, accommodating the competing recommendations of agencies.[144]

Indeed, this interagency consultation process may even lead the President to issue a largely toothless order. An episode from the Clinton

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138 *See* 42 U.S.C. §§ 4321–4370h (2018) (enacting the National Environmental Policy Act); MAYER, *supra* note 11, at 61-65.

139 *See* MAYER, *supra* note 11, at 61-65 (describing "a protracted wrangle between the foreign affairs/defense and environmental agencies about the foreign application of" NEPA).

140 *See id.* at 62 (the concern was that "applying NEPA abroad would undercut foreign policy objectives . . . and interfere with foreign trade and economic development programs").

141 *Id.*

142 *Id.* at 63-64 ("Carter himself resolved the outstanding issues . . . more or less splitting the difference between the agencies").

143 Exec. Order No. 12,114, 44 Fed. Reg. 1957 (Jan. 9, 1979); MAYER, *supra* note 11, at 64 (noting the order's requirements were far less than NEPA demanded of domestic conduct).

144 *See* Rudalevige, *supra* note 111, at 142-44, 150-51 (discussing the history of executive order negotiations within the executive branch); *see also* MAYER, *supra* note 11, at 65 ("The story of Executive Order 12114 is hardly exceptional . . . .").

Administration illustrates this point. A proposed executive order would have required federal agencies to evaluate the effect of agency action on children's environmental health—and, to the extent an agency "failed to protect children fully," to explain and justify that failure.[145] Although one might think that children's health would be an uncontroversial topic, the directive went through months of negotiations.[146] As Rudalevige describes, some agencies worried that the order would open them up to lawsuits; the Department of Health and Human Services wondered how it could legitimately say that "tobacco remained a legal product," given that "[b]anning it would clearly be better for children's health."[147] Even after White House officials had substantially softened the language of the order, President Clinton himself weighed in, suggesting that he "might want to ease [the] burden a bit" more.[148] The final order did instruct agencies to pay attention to children's environmental health, but only "to the extent permitted by law" and only as "appropriate, and consistent with the agency's mission."[149]

Finally, the interagency consultation process may block new directives entirely—even those strongly favored by the President. This point is underscored by a lengthy debate over Lyndon Johnson's Executive Order 11,246, which not only prohibits government contractors from discriminating on the basis of "race, creed, color, or national origin" but also requires them to engage in "affirmative action."[150] When affirmative action became a more controversial topic in the 1980s and 1990s, so did Executive Order 11,246. The order was a thorn in the side of the Reagan and George H.W. Bush

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145 Rudalevige, *supra* note 111, at 142-43.

146 *See id.* at 142-44 (recounting the four-month-long debate over the proposed order).

147 *Id.* at 144.

148 *Id.* (internal quotations omitted). Additionally, "[e]ven as the president was urged to issue the order, several departments continued to press their reservations" and "President Clinton requested still more changes." *Id.*

149 *See* Exec. Order 13,045, § 1, 62 Fed. Reg. 19,885, 19,885 (April 21, 1997) ("[T]o the extent permitted by law and appropriate, and consistent with the agency's mission, each Federal agency: (a) shall make it a high priority to identify and assess environmental health risks . . . that may disproportionately affect children; and (b) shall ensure that its" actions address those risks).

150 Exec. Order No. 11,246, § 202(1), 30 Fed. Reg. 12,319, 12,320 (Sept. 24, 1965). Interestingly, language barring discrimination on the basis of "sex" came from Executive Order 11,375, which President Lyndon Johnson issued a few years later. Exec. Order No. 11,375, 32 Fed. Reg. 14,303, 14,304 (Oct. 13, 1967). Yet courts and commentators commonly refer to the sum total of the orders as "Executive Order 11,246." *See, e.g.*, Contractors Assoc. of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 163 n.6 (3d Cir. 1971) (stating that the prohibition of sex discrimination "comes from Exec. Order No. 11375, . . . and represents a *minor change* from the original" order) (emphasis added); *see also* United States v. Duquesne Light Comp., 423 F. Supp. 507, 508-10 (W.D. Pa. 1976) (discussing only Executive Order 11,246 in a suit alleging "discriminat[ion] against blacks and women").

Administrations, and both attempted to issue a new order to revoke it.[151] Notably, presidential directives remain in force until they are revised or revoked.[152] And executive officials assume that any new directive—even one modifying a prior directive—should go through the same basic process.[153]

This process did not go smoothly for President Reagan or Bush. Although the Department of Justice strongly pushed for revocation of Executive Order 11,246, the Office of Equal Employment Opportunity and the Department of Labor adamantly fought to retain the executive order.[154] Moreover, Mayer reports that the Labor Department's "congressional allies" heard about the planned revocation (as did some civil rights groups), and they pressured each administration to stay the course.[155] Ultimately, both Presidents Reagan and Bush backed down and left Executive Order 11,246 in place.[156]

2. Other Directives

Kennedy's Executive Order 11,030 applies only to directives labeled as "executive orders" or "proclamations."[157] Since at least the George H.W. Bush Administration, Presidents have also relied on presidential "memoranda," which are in substance identical to executive orders.[158] Moreover, since the mid-twentieth century, Presidents have issued national security directives under various labels—for example, "policy papers," "presidential policy directives," or simply "directives."[159] There is no official process for crafting

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151 *See* MAYER, *supra* note 11, at 206-10 (describing these efforts and noting "[b]y the 1980s affirmative action" was "anathema to the Reagan administration").

152 *See* COOPER, *supra* note 21, at 2 (noting that "executive orders and other pronouncements . . . remain in effect" until "they are amended, superseded, or rescinded").

153 *See* De Interview, *supra* note 9 (relating that the same basic process was used for substantive revisions); Gray Interview, *supra* note 9 (asserting that the process was and should be "the same").

154 MAYER, *supra* note 11, at 206-08; RICARDO JOSÉ PEREIRA RODRIGUES, THE PREEMINENCE OF POLITICS: EXECUTIVE ORDERS FROM EISENHOWER TO CLINTON 82-83 (2007). Notably, the Labor Department enforces Executive Order 11,246. *See* Exec. Order No. 11,246, §201, 30 Fed. Reg. 12,319, 12,319 (Sept. 24, 1965).

155 MAYER, *supra* note 11, at 207-08.

156 *See id.* at 209-10, 213 ("Executive Order 11246 ha[s] proved amazingly durable."). After the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena* (which involved separate requirements for government contractors), the Clinton Administration made changes to Executive Order 11,246. *See* 515 U.S. 200, 206-10, 235-39 (1995) (holding that all governmental racial classifications must be subject to strict scrutiny); MAYER, *supra* note 11, at 210-12 (reporting that "the changes were confined to contracting set-asides, not to the affirmative action employment practices required of government contractors").

157 Exec. Order No. 11,030, 27 Fed. Reg. 5847, 5847 (June 19, 1962).

158 *See* COOPER, *supra* note 21, at 16 (describing how memoranda are "sometimes us[ed] . . . interchangeably with executive orders").

159 *Id.* at 207-09. My research suggests that courts rarely weigh in on the meaning of national security directives. That is perhaps not surprising, given that many are classified. *See id.* at 209 ("The vast majority of these [national security] directives are classified . . . .").

these directives. Yet my interviews indicate that these directives also go through agency review.[160] As one former Staff Secretary explained, there is no "formalistic distinction" among documents; "a great deal of care" generally goes into any "product that the President is going to sign."[161]

The main differences are that OMB does not oversee the creation of memoranda or national security directives, and OLC does not necessarily review the documents for "form and legality."[162] Instead, the White House Counsel's office (or another entity in the Executive Office of the President) generally oversees the process.[163] But the process otherwise appears to be quite similar. The relevant entity in the White House sends the draft (which, again, is often written by agency officials) to interested agencies, gets feedback on both law and policy, redrafts, and then sends it out again, perhaps multiple times.[164] As with executive orders and proclamations, the President may be consulted to the extent there are disputes about important directives.[165] The document then goes to the Staff Secretary, who may invite additional comments.[166]

The Staff Secretary sends the text of the resulting directive to the President, along with a memo summarizing the interagency consultation process (again, with a focus on "high-level" issues).[167] Thus, the President does not hear about every single agency comment, but former officials stated that it would be "very bad form" not to advise the President about major disagreements from Cabinet or other top officials.[168] The President then decides whether to sign the resulting document.[169]

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160 *See infra* notes 162–168 and accompanying text.

161 De Interview, *supra* note 9.

162 *See* Bies Interview, *supra* note 9; Egan Interview, *supra* note 9.

163 *See* Egan Interview, *supra* note 9 (detailing how "by tradition," the process is run by "the part of the [White House] responsible for that policy" and that entity endeavors to make sure the issues are "fully developed" and "thoroughly reviewed" by relevant agencies).

164 *See* Fonzone Interview, *supra* note 9 (describing how agencies "with expertise are consulted" and they "likely" helped "draft [the directive] in the first instance"); Gray Interview, *supra* note 9 (explaining that regardless of the document's label, "the proposed document would be circulated for comment").

165 *See* Gray Interview, *supra* note 9 (discussing how the President might be consulted and then he "would make a decision on contested points 1, 2, 3").

166 *See* De Interview, *supra* note 9.

167 The President receives the text of the directive along with an "action memorandum" that describes only "high-level objections." Egan Interview, *supra* note 9. *See also* De Interview, *supra* note 9 (explaining that the "package to the President" includes the text and the summary memo).

168 Egan Interview, *supra* note 9; *see also* Fonzone Interview, *supra* note 9 (asserting that a "good staffer" must inform the President about any major disagreements among agencies).

169 If the President signs the directive, he may—and often does—publish the resulting document in the Federal Register. *See* 44 U.S.C. § 1505(a) (2018) (providing that presidential proclamations, orders, and other documents the President determines to have "general applicability and legal effect" shall be published in the Federal Register).

3. Deviations

There is another factor that further diminishes the distinction among directives: whether a directive is styled as an "executive order," "proclamation," "memorandum," or something else entirely, *executive actors feel free to use a different process*.[170] In other words, Presidents do not consistently follow Kennedy's Executive Order 11,030.

In this way, Presidents take full advantage of the flexibility offered by the Opinions Clause. That provision gives the President the discretion to seek out as much, or as little, counsel as he deems necessary.[171] And as several former officials (from both Democratic and Republican administrations) explained, there are reasons why the President may seek advice on certain directives from a smaller group. Some executive orders are "politically sensitive."[172] If such draft orders are broadly distributed to agency officials (through the usual OMB process), the existence of that draft may be leaked before it has been fully vetted.[173] Accordingly, the White House Counsel's Office may oversee the agency review itself (or ask OMB to use a different process), sending the draft order only to high-level agency officials who will be more cautious about sharing the information.[174] Some orders may even skip OLC "form and legality" review.[175] Accordingly, regardless of the label, a President may opt for a modified process.

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170 *See* MAYER, *supra* note 11, at 60-61 ("There is no penalty for avoiding" Kennedy's Executive Order 11,030, and thus "when the White House is under time pressure it routinely bypasses the formal routine."). As one interviewee explained, there was no "formalistic" divide between an "executive order," "proclamation," or other document, and no particular "machinery" for any given directive. De Interview, *supra* note 9. The White House might use a formal process for a memorandum or a truncated process for an executive order. *Id.*

171 The Opinions Clause, as interpreted in this Article, both explains and justifies presidential departures from Executive Order 11,030. Because the Opinions Clause gives the President the discretion to seek as much or as little advice from his subordinates as he sees fit, Executive Order 11,030 can only provide guidelines, rather than binding rules.

172 De Interview, *supra* note 9 (explaining that the White House might use a different process for a "sensitive" executive order); Luttig Interview, *supra* note 9 (noting that "[i]f you've got something politically sensitive, politically focused," then you would not follow the regular process); *see also* Gray Interview, *supra* note 9 (stating that such departures were "rare" during the George H.W. Bush Administration).

173 *See* De Interview, *supra* note 9 (describing the Office of Management and Budget as akin to a "machine" that has a formal process in place for executive orders, but that a very well-meaning career person might share a "sensitive" draft order too broadly).

174 *See* Egan Interview, *supra* note 9 (agreeing that an executive order might bypass the typical process if it is "sensitive" and noting that OMB itself has ways to "expedite" the process, at least in the national security realm).

175 Political scientist Kenneth Mayer reports that the "most commonly skipped step" is OLC "form and legality" review. MAYER, *supra* note 11, at 60-61. According to Mayer, in such cases, OMB staff "rely[] on informal legal guidance as a substitute." *Id.*

Nevertheless, officials repeatedly reaffirmed that virtually all directives go through some type of agency review. Moreover, for any directive, the process can be tedious. Although it is easier to issue a presidential directive than to enact legislation, the process takes a good deal longer than one might expect—anywhere from several weeks to several months (or even years).[176] Indeed, one former official remarked that "newbies" in his office would complain that it could "take forever" to issue a presidential directive.[177]

III. THE CASE FOR TEXTUALISM

The Opinions Clause of Article II invites the President to seek out advice from his subordinates in order to make a more informed decision. I argue that Presidents have exercised that power in structuring the interagency consultation process for presidential directives. Many directives go through weeks or even months of negotiation; after that process, the President may well decide to issue a compromise or toothless directive—or perhaps no directive at all. Through this process, Presidents have (perhaps surprisingly) exercised the power to tie their own hands—and accept the recommendations of their subordinates.

Although Article II does not require the President to engage in such consultation, the existence of this process has important implications for interpreting presidential directives. A court should not assume that any directive perfectly implements its apparent purposes; nor should a court assume that the directive reflects the President's preferred substantive policy. Any presidential directive may reflect the President's own decision to balance competing interests. Alternatively, and particularly when the President opts for a truncated process, he may well issue a directive that, in hindsight, appears to be ill-considered. The Constitution gives him the power to make—and holds him accountable for—those ill-informed decisions as well. Federal courts, I argue, can best give effect to these presidential decisions by adhering to the text of a directive.

A. *Preliminary Questions: Author's Intent or Purpose?*

Once we turn our focus to Article II, a natural assumption might be that interpreters should focus on the intent of the President. After all, in sharp

176 *See* Egan Interview, *supra* note 9 ("[S]ometimes these documents are argued over in the executive branch for weeks or months . . . ."); MAYER, *supra* note 11, at 61 ("Simple executive orders navigate this process in a few weeks; complex orders can take years, and can even be derailed over the inability to obtain the necessary consensus or clearances.").

177 Egan Interview, *supra* note 9 (describing how some officials viewed the process as "inefficient or bureaucratic").

contrast to statutes enacted under Article I (which must receive the assent of the multi-member Congress and the President), presidential directives seem to have a unitary author. For similar reasons, one might assume that any public statements made by the President should inform the meaning of presidential directives.[178]

These assumptions are very reasonable—until one learns about the complex process that Presidents have crafted for issuing presidential directives. As discussed, interpretive theorists assume that the process for creating a document should inform interpretive theory, and Presidents use a distinct process to create presidential laws.

Presidents, of course, say a lot of things—in the State of the Union Address, other speeches, interviews, press conferences, and even on Twitter.[179] But not every presidential declaration becomes a presidential *law*. Instead, that designation is limited to a subset of presidential issuances—those labeled "executive orders," "proclamations," "memoranda" and the like—that aim to direct the actions of subordinate officials.[180] This

178 To be clear, this Article focuses on the meaning, not the validity, of presidential directives. For arguments that public statements by the President should be relevant to an analysis of constitutionally impermissible motive, *see* Shaw, *supra* note 4 at 1372-74, 1386-97; *see also* Aziz Z. Huq, *What Is Discriminatory Intent?*, 103 CORNELL L. REV. 1211, 1273 (2018) (arguing for consideration of campaign statements to assess presidential intent). This Article thus does not address whether the Supreme Court should have considered President Trump's public statements in evaluating the constitutionality of the third version of the travel ban. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2416-23 (2018) (rejecting an Establishment Clause challenge to the ban despite "statements by the President . . . casting doubt on the official[ly]" stated purpose of the ban). For an insightful analysis of constitutionally impermissible motive in the legislative context, see generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016). For a deep historical look at judicial examination of legislative purpose, see Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1795-1859 (2008).

179 For a recent overview of presidential speech, see generally Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71 (2017).

180 Since 1935, these directives (regardless of the label) have generally been published in the Federal Register. *See* 44 U.S.C. § 1505(a) (2018); *see also supra* notes 24–25, 35–43 (citing presidential directives). To distinguish presidential laws from other presidential speech, courts could use publication in the Federal Register as a "rule of recognition."

This Article brackets that issue, in large part because there seems to be widespread agreement as to what constitutes a presidential law as opposed to other speech. *See, e.g.*, Shaw, *supra* note 4, at 93 (differentiating "presidential speech" from "presidential action" like executive orders, presidential memoranda, proclamations, and executive agreements). This well-established distinction between presidential "speech" and "action" is illustrated by the recent controversy surrounding transgender individuals in the military. In a series of tweets, President Trump declared that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military." Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864 [https://perma.cc/3GKL-J2DT]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472 [https://perma.cc/Y4CE-NRES]. But the Department of Defense took no action until the

designation as a presidential law is important, because such laws bind not only lower-level officials but also *future presidential administrations*. As my interviews underscored, executive officials assume that a presidential directive governs all successive administrations until the directive is formally revised or revoked.[181] Other presidential speeches do not have the same binding force across administrations.

For these presidential laws, Presidents rely on a complex process through which agency officials draft, revise, and redraft directives. At the end of this process, a President may opt to sign a directive that does not reflect his preferred substantive policy ("purpose") or wishes ("intent").[182] Relatedly, as discussed further below, the resulting directive may be in considerable tension with the President's other public statements.[183] The President may opt for compromise in the directive, taking into account the competing wishes of agency officials.

The process for crafting presidential directives thus offers an important illustration of what Daphna Renan calls the President's "two bodies": the often uncertain "relationship between the *person* of the president and the . . . *institution* of the presidency."[184] In this context, individual Presidents have chosen to rely largely on the institution of the presidency to determine

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President followed up with a formal memorandum. *See* Memorandum on Military Service by Transgender Individuals, § 1(b), 82 Fed. Reg. 41,319 (Aug. 25, 2017) (directing relevant officials to terminate the official policy allowing "military service by transgender individuals"); Bryan Bender & Jacqueline Klimas, *Pentagon Takes No Steps to Enforce Trump's Transgender Ban*, POLITICO (June 27, 2017, 11:28 AM), https://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029 [https://perma.cc/UK58-NC2C] (explaining that the Department of Defense did not treat the initial tweets as a binding directive). Even if executive officials in the Trump Administration had treated the tweets as a presidential directive, it is highly unlikely that any subsequent administration would have done so. By contrast, a subsequent administration will treat a presidential memorandum as a directive that remains in force until it is revoked. *See infra* note 181 and accompanying text.

181 Notably, *every* official I interviewed treated the binding nature of directives as a given. *See supra* notes 152–153 and accompanying text. This accords with both official declarations of the executive branch and political science research. *See, e.g.*, O.L.C., Legal Effectiveness, *supra* note 23, at 29-30 ("[A] presidential directive . . . would remain in force, unless otherwise specified, pending any future presidential action."); COOPER, *supra* note 21, at 2 ("[E]xecutive orders and other pronouncements . . . remain in effect unless and until they are amended, superseded, or rescinded.").

182 To be sure, "intent" is a challenging concept, one that is not always clearly defined or distinguished from "purpose." But one can think of "intent" as a wish for how a law will be applied in a particular case, while "purpose" is "the general aim or policy which pervades a [law] but has yet to find specific application." Manning, *supra* note 70, at 1291 n.22 (quoting Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370-71 (1947)).

183 *See infra* subsection III.B.2.b; Section III.C.

184 Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. (forthcoming 2020) (manuscript at 1), https://ssrn/com/abstract=3505345 (emphasis added).

the contours of presidential directives. That is, individual Presidents have ceded considerable power to the broader administrative apparatus.

Part IV explores some reasons why Presidents may choose to tie their own hands through the interagency consultation process. But for now, it is important to understand that presidential directives often do not reflect the author's intent or perfectly carry out a single purpose. It turns out that "unilateral" presidential directives are less unilateral than one might have presumed.

B. *Consultation and Presidential Decisionmaking*

Presidential directives are often the product of a compromise among agencies. I argue here that a focus on the text will enable courts to best capture those presidential decisions. But I first examine the less common (but still important) scenario: when the President bypasses most of the established process. Article II, I suggest, has lessons for that scenario as well.

1. Lack of Consultation and Accountability

In January 2017, President Trump issued his first travel ban, which suspended the entry of individuals from seven predominantly Muslim countries.[185] Although we still do not know the details of the process leading up to that directive, there seems to be widespread agreement that it bypassed virtually all agency review.[186] Notably, that was true, even though the directive was styled as an "executive order."

In the litigation over that first travel ban, one central issue was whether the White House Counsel could (after the fact) issue a memorandum

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185 *See* Travel Ban Version One, *supra* note 24, § 3(c), at 8978 (suspending entry from countries referred to in 8 U.S.C. § 1187(a)(12)); *see also* Washington v. Trump, 847 F.3d 1151, 1156 (9th Cir. 2017) ("[S]ection 3(c) of the Executive Order suspends for 90 days the entry of aliens from seven countries: Iraq, Iran, Libya, Somalia, Sudan, Syria, and Yemen.").

186 *See* Evan Perez, Pamela Brown & Kevin Liptak, *Inside the Confusion of the Trump Executive Order and Travel Ban*, CNN (Jan. 30, 2017, 11:29 AM), https://www.cnn.com/2017/01/28/politics/donald-trump-travel-ban/index.html [https://perma.cc/QE55-52Q2] (reporting that the White House contended that "OLC signed off and agency review was performed," but "[a] source said the creation of the executive order did not follow the standard agency review process"); Kim Soffen & Darla Cameron, *How Trump's Travel Ban Broke from the Normal Executive Order Process*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/graphics/politics/trump-travel-ban-process/ [https://perma.cc/L2JG-SJ2J] (reporting that the order was reviewed by the OLC, but that it skipped most, if not all, of the consultation process). Some federal courts accepted the reports that the first travel ban bypassed most review. *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 241 F. Supp. 3d 539, 545 (D. Md.) ("The drafting process . . . did not involve traditional interagency review . . . . [T]here was no consultation with the Department of State, the Department of Defense, the Department of Justice, or the Department of Homeland Security."), *aff'd in part, vacated in part*, 857 F.3d 554 (4th Cir. 2017).

narrowing the scope of the Executive Order.[187] The issue arose out of confusion over whether the ban applied to lawful permanent residents (LPRs).[188] The text was certainly broad enough to encompass such individuals. The President "proclaim[ed] that the immigrant and nonimmigrant entry . . . of aliens from [the seven] countries . . . would be detrimental to the interests of the United States" and thus "suspend[ed] entry . . . of such persons for 90 days."[189] Moreover, the Executive Order expressly "exclude[d]" certain visa holders from the travel ban, including "foreign nationals traveling on diplomatic visas."[190] LPRs were notably absent from the list of exceptions. But soon after the Executive Order was challenged in court, the White House Counsel issued a memorandum "clarify[ing]" that the ban did not "apply to lawful permanent residents."[191]

Federal courts disagreed sharply over whether they should accept the "clarification" offered by the White House Counsel.[192] The lessons of the constitutional structure strongly suggest that the answer should be no.[193]

The Opinions Clause of Article II permits, but does not require, the President to seek advice from subordinates. Accordingly, the President had the constitutional power to forgo agency review. But another lesson of the Opinions Clause is that the President must be accountable for the resulting (perhaps ill-informed) decision. Our Constitution created no council of

187 *See, e.g.*, Louhghalam v. Trump, 230 F. Supp. 3d 26, 32-33 (D. Mass. 2017).

188 *Id.*

189 Travel Ban Version One, *supra* note 24, § 3(c), at 8978.

190 *Id.*

191 Memorandum from Donald F. McGahn II, Counsel to the President, to the Acting Sec'y of State, the Acting Att'y Gen., & Sec'y of Homeland Sec. (Feb. 1, 2017), https://case.edu/executive-order-updates/docs/f.pdf [http://perma.cc/Q4GQ-HPCK].

192 *Compare Louhghalam*, 230 F. Supp. at 32-33 (concluding, based in part on the White House Counsel's memorandum, that the executive order did not apply to lawful permanent residents, and thus the claims as to those plaintiffs were moot), *with* Washington v. Trump, 847 F.3d 1151, 1165-66 (9th Cir. 2017) (declining to credit the memorandum in considering mootness of claims) *and* Aziz v. Trump, 234 F. Supp. 3d. 724, 727-28 (E.D. Va. 2017) (same).

193 Under the Presidential Subdelegation Act of 1950, the President may delegate certain functions, such as clarifying a directive, to subordinates via directive. 3 U.S.C. § 301 (2018). But that statute did not apply here for two reasons. First, the statute permits delegation only to an official subject to Senate confirmation. *Id.* The White House Counsel does not undergo a Senate vote. *See* Jeremy Rabkin, *At the President's Side: The Role of the White House Counsel in Constitutional Policy*, 56 LAW & CONTEMP. PROBS. 63, 63-64 (1993) (observing that although "[t]he Attorney General (along with other top officers in the Justice Department) must be confirmed by the Senate," the White House Counsel and his aides "are appointed at the sole discretion of the president"). Second, any such delegation must be in the text of the directive or otherwise published in the Federal Register. *See* 3 U.S.C. § 301 (2018) ("Such designation and authorization shall be in writing [and] shall be published in the Federal Register . . . ."). President Trump's order said nothing about a delegation to the White House Counsel. Travel Ban Version One, *supra* note 24, § 3(c), at 8978. Notably, such issues of presidential delegation present many challenging questions that are beyond the scope of this Article.

advisors with veto power over presidential decisions—and thus no council for the President to blame if things went wrong.[194] A logical corollary of that structural principle would be that the President's subordinates also cannot fix any presidential errors after the fact. The Opinions Clause "concentrate[s] accountability for presidential action on the president himself."[195]

2. Consultation, Compromise, and Even Toothless Directives

As commentators suggested at the time of the first travel ban, and as my own research confirmed, most directives go through a far more searching review. This process has important implications for interpretive method. At the end of the interagency consultation process, Presidents may opt to issue compromise or even watered-down directives. I argue that federal courts should respect the President's decision to accept half a loaf. And courts can best respect that decision by adhering to the text.

a. *Compromise Directives*

As we have seen, when agencies in the Carter Administration were divided over a draft executive order, the President "split[] the difference" among the agencies and issued an order that did not reflect his preferred substantive policy.[196] Along the same lines, a President may opt to issue a directive that does not perfectly implement its apparent purposes. For that reason, I argue that courts should adhere to the limitations in the text, rather than attempt to carry out the apparent purpose of a directive.

A dispute over an executive order issued by President Clinton under the International Emergency Economic Powers Act (IEEPA) helps to illustrate this point.[197] The IEEPA permits the President to block financial transactions involving a country that presents a national security threat.[198]

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194 *See supra* Section II.A.

195 AMAR, *supra* note 94, at 326.

196 MAYER, *supra* note 11, at 63-64; *see supra* subsection II.B.1.b.

197 *See infra* notes 198–212 and accompanying text.

198 50 U.S.C. §§ 1701–1702 (2018). IEEPA executive orders have led to assorted litigation. *See* Kirschenbaum v. 650 Fifth Ave., 830 F.3d 107, 117, 124-25, 142 (2d Cir. 2016) (addressing the definition of "Iran" in Exec. Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012)); United States v. Hassanzadeh, 271 F.3d 574, 576, 579, 581-83 (4th Cir. 2001) (determining that goods "of Iranian origin" encompass Persian rugs under Exec. Order No. 12,613, 52 Fed. Reg. 41,940 (Oct. 29, 1987)); United States v. Elashi, 440 F. Supp. 2d 536, 541-43, 568-69 (N.D. Tex. 2006) (concluding that the defendant's property fell within the ban in Exec. Order No. 12,947, 60 Fed. Reg. 5,079 (Jan. 23, 1995)).

Any person who violates such an executive order may be subject to civil or criminal penalties.[199]

Mohammad Reza Ehsan was criminally prosecuted for violating Clinton's Executive Order 12,959, which prohibited the "export[]" of goods to Iran.[200] Ehsan had ordered the shipment of a product from the United States to Dubai, apparently planning to send it later to Iran.[201] Ehsan argued, however, that this shipment was "not an impermissible 'export'" (from the United States to Iran) but a *permissible* "export" (from the United States to Dubai) and "reexport" (from Dubai to Iran).[202]

There was considerable support for Ehsan's interpretation in the text of the order. Executive Order 12,959 broadly barred "the exportation from the United States to Iran . . . of any goods, technology . . . or services."[203] But the order prohibited "the reexportation to Iran" only of "any goods or technology" subject to certain licensing requirements.[204] All parties agreed that Ehsan's product was not subject to those licensing rules.[205] Moreover, the term "export" is often used to refer to the movement of goods from the United States to a foreign country, while "reexport" refers to the shipment of goods from a foreign country to another foreign country.[206]

Executive Order 12,959 appeared to reflect a compromise. The primary focus was, of course, ensuring that products were not sent directly from the

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199 *See* 50 U.S.C. § 1705 (2018) (making it "unlawful" to violate any order issued pursuant to the IEEPA, with penalties including imprisonment up to twenty years).

200 U.S. v. Ehsan, 163 F.3d 855, 856 (4th Cir. 1998).

201 *Id.* at 857. Ehsan was not a sympathetic defendant. He had attempted to order the product (Transformer Oil Gas Analysis Systems) from a U.S. company for direct shipment to Iran. *Id.* The U.S. company declined, because of the export ban. *Id.* So then Ehsan ordered that the product be shipped to Dubai, with plans to send it to Iran. *Id.* U.S. customs agents learned about the deal, and Ehsan was arrested by federal agents. *Id.*

202 *Id.* at 859; *see also id.* ("Ehsan insists that the government may not prosecute him for an export to Iran when he reasonably could have thought he was engaged in reexportation.").

203 Exec. Order No. 12,959, §1(b), 60 Fed. Reg. 24,757, 24,757 (May 6, 1995); *see also id.* (prohibiting "the exportation from the United States to Iran . . . of any goods, technology (including technical data . . . subject to the Export Administration Regulations . . .), or services").

204 *Id.* § 1(c), at 24,757; *see id.* (prohibiting "the reexportation to Iran . . . of any goods or technology (including technical data or other information) exported from the United States, the exportation of which to Iran is subject to [certain] export license application requirements").

205 *See Ehsan*, 163 F.3d at 857 n.1 (agreeing that Ehsan's product was "exempt from the reexportation ban").

206 That is true, for example, of the Department of Commerce's Export Administrative Regulations (EAR), which were issued pursuant to the Export Administration Act of 1979. *See* 15 C.F.R § 734.13(a)(1) (2020) (defining "export" as "[a]n actual shipment or transmission out of the United States"); 15 C.F.R. § 734.14(a)(3) (defining "reexport" as "[a]n actual shipment or transmission of an item subject to the EAR from one foreign country to another foreign country"). Notably, Clinton's order expressly referred to those regulations. *See* Exec. Order No. 12,959, §1(b), 60 Fed. Reg. at 24,757.

United States to a country the President viewed as an international sponsor of terrorism.[207] But "reexportation" is a potentially trickier issue, because it involves the passage of goods between two foreign countries.[208] After consultation with interested agencies (which would almost certainly have included the State Department, Treasury Department, and National Security Agency),[209] the President might reasonably have opted to bar "reexportation" in more limited circumstances. Accordingly, Ehsan had a strong argument that he could export goods (from the United States to Dubai), and then reexport them (from Dubai to Iran) without running afoul of the order.

The *Ehsan* court did not consider that possibility. Instead, the court interpreted the Executive Order in accordance with what the court found to be its "obvious purpose."[210] "[T]he Executive Order intended to cut off the shipment of goods intended for Iran."[211] Because Ehsan's goal was to "seek a market in Iran," his shipment constituted an "exportation" to Iran.[212] That is, the court interpreted the Executive Order so as to most effectively carry out its apparent purpose. But once we recognize that Presidents often issue compromise orders, courts have good reason to hew closely to the limitations embodied in the text.

In sum, I argue that courts should respect the President's power to issue a less-than-effective order—and let the President correct any "mistakes" himself. As it turns out, President Clinton did later revise the executive order at issue in *Ehsan* to broaden the ban on reexportations.[213] I return to the importance of revised directives below.

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207 *Cf. Ehsan*, 163 F.3d at 859 (finding that the President sought in part to "sanction[] Iran's sponsorship of international terrorism").

208 *See supra* note 206 (citing sources defining "reexportation" as the movement of goods from one foreign country to another foreign country).

209 *See* Fonzone Interview, *supra* note 9 (noting the agencies consulted on national security issues). Today, the list would also include the Department of Homeland Security (DHS), but DHS did not exist in 1995. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (creating DHS).

210 *Ehsan*, 163 F.3d at 859.

211 *Id.*

212 *Id.* at 857-59. The court asserted that its interpretation was consistent with the text of the directive. Throughout history, the court stated, "'exportation' has consistently meant the shipment of goods to a foreign country with the intent to join those goods with the commerce of that country." *Id.* at 858. Under this view, the Executive Order barred the "exportation" of any goods headed (ultimately) for Iran. *Id.* at 859. But throughout this analysis, the court failed to explain how this definition might differentiate an "export" from a "reexport" to Iran.

213 The subsequent order would clearly have covered Ehsan's conduct. *See* Exec. Order No. 13,059, § 2, 62 Fed. Reg. 44,531, 44,531 (Aug. 19, 1997) (prohibiting "the exportation, reexportation . . . directly or indirectly, from the United States, or by a United States person . . . of any goods . . . to Iran . . ., including the exportation, reexportation . . . undertaken with knowledge or reason to know . . . such goods . . . are intended" for Iran).

b. *Toothless Directives*

Presidents may also opt, after consultation, to issue directives that do very little at all. Clinton's executive order on children's environmental health illustrates this point. After agencies repeatedly expressed concerns about lawsuits, and the extent to which the new directive might be in tension with other commitments (like the legality of tobacco), Clinton decided to "ease [the] burden a bit" and issued a watered-down directive.[214] The ultimate order instructed agencies to act only "to the extent permitted by law" and only as "appropriate, and consistent with the agency's mission . . . ."[215]

Some readers might think that Presidents always hedge their bets in directives in order to stave off legal challenge, and thus always include qualifiers like "to the extent permitted by law." But that is not the case. For example, the executive order in *Ehsan* (Clinton's Executive Order 12,959) "*prohibited* . . . the exportation" of certain products "from the United States to Iran," without such qualifiers.[216] Likewise, President Trump's second and third travel bans—which, by all accounts, were subject to a more extensive consultation process than the first[217]—"*suspended*" the entry of designated individuals.[218] There was no qualifying language attached to those suspensions.[219]

This analysis has important implications for recent litigation over President Trump's executive order on funding for sanctuary cities. One of the

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214 Rudalevige, *supra* note 111, at 144; *see supra* subsection II.B.1.b.

215 Exec. Order 13,045, § 1, 62 Fed. Reg. 19,885, 19,885 (April 21, 1997).

216 Exec. Order No. 12,959, §1(b), 60 Fed. Reg. 24,757, 24,757 (May 6, 1995). There were likewise no such qualifiers in the revised directive. *See* Exec. Order No. 13,059, § 2(a) 62 Fed. Reg. 44,531, 44,531 (Aug. 19, 1997).

217 *See* Steve Holland & Julia Edwards Ainsley, *Trump Signs Revised Travel Ban in Bid to Overcome Legal Challenges*, REUTERS (March 6, 2017), https://www.reuters.com/article/us-usa-immigration-exclusive/trump-signs-revised-travel-ban-in-bid-to-overcome-legal-challenges-idUSKBN16D154 [https://perma.cc/588H-YD24] (reporting that Defense Secretary Jim Mattis and other senior cabinet members provided input on the revised travel ban); *see also* W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J.F. 825, 839 (2018) ("By all accounts, EO-3 appears to have gone through at least some review . . . .").

218 *See* Travel Ban Version Two, *supra* note 24, §2(c), at 13213 (suspending entry subject only to specified limitations, waivers, and exceptions); *see* Travel Ban Version Three, *supra* note 25 §2, at 45165-67 ("The entry . . . of nationals of the following countries is hereby suspended and limited, as follows, subject to categorical exceptions and case-by-case waivers . . . .").

219 Notably, *other* provisions of the second travel ban contained the "to the extent permitted by law" qualifier. But the "suspension of entry" provision did not. *See* Travel Ban Version Two, *supra* note 24, §6(d), at 13216 ("It is the policy of the executive branch that, *to the extent permitted by law and as practicable*, State and local jurisdictions be granted a role in the process of" refugee resettlement (emphasis added)); *id.* § 9(b), at 13217 ("*To the extent permitted by law* and subject to the availability of appropriations, the Secretary of State shall immediately expand the Consular Fellows Program . . . ." (emphasis added)). The third travel ban contained no such qualifier in any section.

central questions is whether the order does anything at all.[220] Executive Order 13,768 provides:

> [T]he Attorney General and the Secretary [of DHS], *in their discretion and to the extent consistent with law*, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.[221]

The order further states that "[t]he Secretary has the authority to designate, *in his discretion and to the extent consistent with law*, a jurisdiction as a sanctuary jurisdiction."[222]

Notably, this question of meaning is preliminary to the challenging constitutional questions in the case. As the plaintiff localities have argued, if Executive Order 13,768 requires the Attorney General and DHS Secretary to strip federal grants from localities, the President has arguably usurped Congress's power under the Spending Clause, thereby transgressing the constitutional separation of powers, and commandeered localities in violation of the federalism principles underlying the Tenth Amendment.[223]

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220 Another issue was whether the Attorney General could "clarify" the order via memorandum. *See* Memorandum from the Attorney General to All Department Grant-Making Components 1 (May 22, 2017), https://www.justice.gov/opa/press-release/file/968146/download [https://perma.cc/M7MU-5N9P] (stating that Executive Order 13,768 only applies to "federal grants administered by the Department of Justice or the Department of Homeland Security, and not to other sources of federal funding"). For reasons discussed in connection with the first travel ban, I do not believe that the Attorney General could contradict the plain text of the order. *See supra* subsection III.B.1. Although the President can delegate some functions to high-level officials by directive, the government has not suggested that the Attorney General sought to exercise any such delegated power. *See supra* note 193. The more challenging question in these cases is what the text means.

221 Exec. Order No. 13,768, § 9(a), 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (emphasis added) [hereinafter Sanctuary City Order]; *see also id.* at §2(c), 82 Fed. Reg. at 8799 ("It is the policy of the executive branch to . . . [e]nsure that jurisdictions that fail to comply with applicable Federal law do not receive Federal funds, *except as mandated by law*.") (emphasis added). Under the statute, state and local government entities may not prohibit their officials from sharing with federal officials "information regarding the . . . immigration status" of an individual. 8 U.S.C. § 1373(a) (2018). Notably, a federal court recently found the statute itself unconstitutional. *See* City of Philadelphia v. Sessions, 309 F.Supp.3d 289, 329-31, 344-45 (E.D. Pa. 2018) (holding § 1373(a) and (b) unconstitutional under the Tenth Amendment because it "unequivocally dictates what a state legislature may and may not do") (internal quotations omitted), *aff'd in part, vacated in part sub nom. on other grounds* City of Philadelphia v. Att'y Gen., 916 F.3d 276 (3d Cir. 2019).

222 Sanctuary City Order, *supra* note 220, § 9(a), at 8801 (emphasis added).

223 *See* City and Cty. of S.F. v. Trump, 897 F.3d 1225, 1231, 1234-35 (9th Cir. 2018) (concluding that the order violated separation of powers principles); Cty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 507, 530-36 (N.D. Cal. 2017) (finding separation of powers, federalism, and due process violations).

That may be precisely why the Executive Order is couched in qualifiers. As officials told me, during the interagency consultation process, agency officials will often point out if a proposed directive seems to violate a federal statute, regulation, or the U.S. Constitution. Likewise, OLC review is focused on such questions of legality.[224] Of course, we do not know that the order went through much review; it was issued in the early days of the Administration. Nonetheless, even a brief review could have uncovered these troubling issues.

In a recent opinion on Executive Order 13,768, a Ninth Circuit majority found it implausible that the President had issued a toothless directive. The court declared that any such interpretation "strains credulity."[225] After all, the court emphasized, "Section 9(a) orders 'the Attorney General and the Secretary' to 'ensure that [sanctuary jurisdictions] . . . are not eligible to receive Federal grants . . . .'"[226] The court discounted the "as consistent with law" qualifiers.[227] A narrow reading, the court emphasized, would be at odds with the "object and policy" of the order—as reflected in public statements by the Administration.[228] "The President himself stated that he would use defunding as a 'weapon'" against sanctuary cities, and the White House Press Secretary reiterated that "President Trump would 'make sure that . . . counties and other institutions that remain sanctuary cities don't get federal government funding . . . .'"[229]

Dissenting, Judge Ferdinand Fernandez suggested that his colleagues had too quickly "shunt[ed] aside" the "consistent with law" phrases in the Executive Order.[230] "[I]f there is ambiguity in certain parts of the Executive

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224 *See supra* Section II.B.

225 *S.F.*, 897 F.3d at 1238.

226 *Id.* at 1239. The court emphasized that Executive Order 13,768 exempted funds "deemed necessary for law enforcement purposes" and concluded that the order must apply to—and require the Attorney General and DHS Secretary to take away—all other funds from designated "sanctuary cities." *Id.*

227 *See id.* at 1239-40 (concluding that "the Executive Order unambiguously commands action" and its "savings clause does not and cannot override its meaning").

228 *See id.* at 1242-43 ("If we look beyond the text of the Executive Order, the Administration's position becomes considerably weaker.").

229 *Id.* at 1243; *see also* Daniel Simon and Jesse Marx, *Trump: Feds May Defund Calif. Over Sanctuary-state Push*, USA TODAY (Feb. 6, 2017, 6:35 PM), https://www.usatoday.com/story/news/politics/2017/02/06/california-sanctuary-state-trump/97567378/ [https://perma.cc/8U4N-KYXV] (reporting that the President stated: "Well, it's a weapon. I don't want to defund the state or a city." but "[i]f they [are] going to have sanctuary cities, we may have to do that. Certainly, that would be a weapon.").

230 *S.F.*, 897 F.3d at 1249-50 (Fernandez, J., dissenting); *id.* at 1249 (describing the qualifiers as "short but clear and extraordinarily important wording in the Executive Order"); *see also id.* at 1247-48 (finding the localities' claims to be unripe).

Order, it is not at all ambiguous in its use of the restrictive language."[231] Judge Fernandez insisted: "To brush those words aside as implausible, or boilerplate, or even as words that would render the Executive Order meaningless was just to say that the plain language of the Executive Order should be ignored in favor of comments made dehors."[232]

The litigation over Executive Order 13,768 illustrates the importance of considering presidential directives as a distinct area of interpretive inquiry. Although this Article does not aim to resolve all the issues in these cases, the analysis here should offer guidance on the question of meaning. First, once we consider the interagency consultation process, it becomes quite plausible that the President issued a directive that did not match his preferred substantive policy. Although the President may have wanted to "use defunding as a 'weapon'" and hoped sanctuary cities would not "'get federal government funding,'"[233] the directive he issued is far more muted. The directive is couched in qualifiers, instructing the Attorney General and DHS Secretary to act only "to the extent consistent with law."[234] Moreover, not all presidential directives—including not all directives issued by the Trump Administration—contain similar qualifying language.[235] That fact alone makes the "consistent with law" language in Executive Order 13,768 seem more significant.[236]

Finally, it is quite plausible that the President issued a largely toothless directive. During the interagency consultation process, the President may have been advised that, however much he might want to, he lacks the power to defund localities. Notably, in that event, neither the Attorney General nor the DHS Secretary could legitimately rely on the order to take away federal grants.[237] As Judge Fernandez put it, "whatever the President, or others, might wish for in order to achieve what they deem to be a more

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231 *Id.* at 1249-50.

232 *Id.* at 1249.

233 *Supra* note 229 and accompanying text.

234 Sanctuary City Order, *supra* note 220, § 9(a), at 8801.

235 *See supra* notes 218–19 and accompanying text.

236 Although one can debate the relevant context for purposes of textual analysis, this Article assumes that context includes other presidential directives (at least those issued by the same administration). *See supra* note 19 and accompanying text.

237 The Attorney General has sought to rely on other sources of legal authority to defund sanctuary cities. But those efforts have so far met with mixed results. *Compare* City of Chicago v. Sessions, 888 F.3d 272, 283-87, 293 (7th Cir. 2018) (holding the Attorney General lacked statutory authority); Philadelphia v. Attorney General, 916 F.3d 276, 279, 293 (3d Cir. 2019) (same), *with* State v. Department of Justice, 951 F.3d 84, 90, 123-24 (2d Cir. 2020) (concluding that the Attorney General had statutory authority to deny certain federal funds to localities that did not comply with "three immigration-related conditions" and finding no Tenth Amendment violation).

perfect polity," the Executive Order seems to "recognize[] their limits in achieving that."[238]

C. *The Institutional Setting of Presidential Directives*

This Article has emphasized that any theory of interpreting presidential directives must focus on both Article II and the institutional setting of the presidency. A few features of that institutional setting buttress this Article's case for textualism. Indeed, textualism may have more appeal in this context than it does in the statutory realm.

1. The Relevance of Publicly-Available Statements

As the sanctuary cities litigation illustrates, one question that courts face is determining whether to rely on extratextual evidence to inform the meaning of a presidential directive. I argue that the existence of the interagency consultation process casts considerable doubt on the utility of such evidence.

Notably, extratextual evidence is often not even available. Indeed, presidential directives differ from statutes and regulations in part because there is typically no "executive history" or other administrative record.[239] The OMB does keep a file on executive orders and proclamations but generally does not release those files until many years after a directive is issued (if at all).[240] And OMB likely has no information about the agency review process for other directives. Accordingly, in most cases, a court will have no executive history, even if it presumed that such materials might shed light on the

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238 *S.F.*, 897 F.3d at 1248 (Fernandez, J., dissenting).

239 "Each House shall keep a Journal of its Proceedings, and from time to time publish the same . . . ." U.S. CONST. art. I, § 5, cl. 3. Although some jurists worried in the early-twentieth century about the public availability of legislative history, there is no question that lawyers today can access that material. *See* Nelson, *supra* note 75, at 367 ("[T]he most widely used kinds of legislative history are [just as] available to the [public as] the statutory texts they purport to explain.").

240 *See* Rudalevige, *supra* note 111, at 147-48 (noting that as of his 2012 article, "some executive order files [were] available up to late 1987"). Some materials may be accessible via a Freedom of Information Act request, but such proceedings can be lengthy. *See* 5 U.S.C. § 552(f) (2018) (stating that FOIA applies to the Executive Office of the President, which encompasses the OMB); *see also* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1135, 1140 (2017) (noting complaints by journalists that FOIA is "too sluggish, too difficult to navigate, and too limited in its substantive scope to be of much use") Even if the materials were available, much of the file would be of limited value, given that the President does not see the bulk of the agency comments. The most valuable document would be the memo that the President receives along with the text, providing an overview of the interagency debate. It is unclear whether that document is typically in the OMB file. *See* Section II.B (describing the documents that go to the President).

interpretive inquiry. Although this Article does not rely heavily on the point, the lack of executive history does provide a functional reason for courts to adopt a textualist approach to presidential directives.

The more important question, in my view, is what courts should do with the extratextual material that *is* available. After all, as the sanctuary cities litigation illustrates, even if there is no "executive history," a court may be able to look at public statements by the White House press secretary or even comments by the President himself.

I argue that the very existence of the interagency consultation process casts doubt on the utility of such "outside comments" to discern the meaning of a directive.[241] The President may have an incentive to take a strong stand in the public sphere, as when President Trump threatened to "use defunding as a 'weapon'" against sanctuary cities.[242] Yet behind closed doors, the discussions may look very different—as officials raise concerns about the legality or wisdom of a proposed action. Ultimately, the President may opt to sign a compromise or even toothless directive—one that does not reflect his preferred substantive policy. Courts give effect to that presidential decision by adhering to the text of the directive that the President has designated as law.

2. Updating Directives

Statutory textualists "often respond to accusations that their interpretations lead to unwise or unjust results by insisting that 'if Congress doesn't like it, Congress can fix it.'"[243] But such arguments seem insensitive to the very bicameralism and presentment process that textualists themselves emphasize. Because of the veto gates of the statutory process, it may be very challenging to amend a law in response to a judicial decision.[244]

By contrast, presidential directives appear to be easier to revise.[245] Notably, two months after President Wilson granted the "blanket pardon" at

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241 To be clear, this Article focuses on the meaning, not the validity, of presidential directives. It is a separate question whether public statements by the President are relevant to an analysis of constitutionally impermissible motive. *See supra* note 178.

242 *Supra* note 229 and accompanying text.

243 JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 58 (2d ed. 2013).

244 *See, e.g.*, Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 504-05 (2014) (doubting on this basis textualists' "contention that legislatures generally can cure misinterpretations by courts").

245 Political scientist Sharece Thrower has shown that around half of the executive orders issued between 1937 and 2013 have been modified in some way. *See* Sharece Thrower, *To Revoke or Not Revoke? The Political Determinants of Executive Order Longevity*, 61 AM. J. POL. SCI. 642, 643-44

issue in *De Kay v. United States*, he realized that he might have gone a bit overboard and issued a clarifying proclamation.[246] The new directive stated that the pardon applied *only* to individuals whose sentences had been "illegally suspended"—that is, those affected by the Killits decision.[247] Likewise, President Clinton closed the (apparent) loophole in *Ehsan* by broadening the ban on "reexportations."[248] President Trump has revised his travel ban twice.[249]

That is not to say that it is always easy to revise a presidential directive. Presidents Reagan and George H.W. Bush utterly failed in their attempts to revoke Lyndon Johnson's Executive Order 11,246, which barred discrimination and required affirmative action by government contractors.[250] As discussed, Presidents assume that revisions are subject to the same interagency consultation process as initial orders; and sometimes that process leads a President to issue no directive at all. Yet the complexity of the process still pales in comparison to the veto gates of the bicameralism and presentment process of Article I.[251] Accordingly, to the extent a President concludes that a court has erred in its understanding of a given directive, the President can more readily respond.[252] In short, some of the concerns with textualism in the statutory context seem to be less pressing here.

(2017) ("Of the 6,158 executive orders issued between 1937 and 2013, 18% are amended, 8% are superseded, and 25% are revoked.").

246 Defining Pardon and Amnesty Proclamation Dated June 14, 1917 (Aug. 21, 1917), *in* 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 8318-19 (New York, Bureau of National Literature, 1921).

247 *See id.* (stating that the pardon should apply "to no other[]" defendants); *see also supra* Section I.B (discussing *De Kay*). It is unclear whether Wilson acted in response to the *De Kay* case.

248 *See supra* note 213 and accompanying text. It is unclear whether the Clinton Administration was prompted by the *Ehsan* case.

249 *See* Travel Ban Version Two, *supra* note 24; Travel Ban Version Three, *supra* note 25.

250 *See* subsection II.B.1.b.

251 *Cf.* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 & n.5 (1992) (noting the oversized role of congressional players who "control the various veto gates").

252 Notably, I have not found empirical work specifically addressing presidential overrides of judicial decisions. Accordingly, I have no direct comparison to the literature on congressional overrides. *See, e.g.*, Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1319-20 (2014) (finding that the 1990s was "the golden age of overrides," and "overrides declined . . . dramatically" after 1998). Nevertheless, given the empirical work suggesting that Presidents often modify directives (with or without a court decision), it seems quite plausible that Presidents would have an easier time responding to judicial decisions. *See supra* note 245 (discussing recent political science literature on presidential revocations of executive orders).

IV. A SELF-IMPOSED CONSTRAINT ON PRESIDENTIAL POWER

The Opinions Clause of Article II empowers the President to seek out advice from his subordinates—to invite them to help him ensure the faithful execution of the laws. Since at least the 1930s, Presidents have exercised that power to create a robust interagency consultation process for presidential directives. Agency officials often spend weeks or months debating the legal and policy details of the text. And at the end of this process, the President may well opt for compromise. The federal judiciary, I argue, can best give effect to the structure the President has created under Article II—with its potential for compromise and less-than-effective policy—by adhering to the text of a directive.

But this argument also has broader implications. Through the interagency consultation process, Presidents have opted to place a constraint on their own power. This Part first explores why Presidents may have crafted such a check and then suggests how the analysis here connects to theories of the constitutional separation of powers.

A. *Structural and Political Incentives*

It may seem surprising that Presidents would, in effect, tie their own hands through the process for issuing directives. But Presidents have various structural and political incentives to rely on their subordinates. First, as a practical matter, Presidents do not have time to draft (perhaps any) directive. So they must rely on subordinates to do the writing. Second, Presidents are generalists; they do not have expertise in the myriad areas in which Presidents issue directives—ranging from proclaiming national monuments,[253] to overseeing government procurement contracts,[254] to barring financial transactions involving threatening foreign powers.[255] Presidents thus rely on subordinates (often, from multiple agencies) who have expertise in a given area.[256]

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253 *See* Antiquities Act of 1906, Pub. L. No. 209, 34 Stat. 225 (codified at 54 U.S.C. § 320301(a) (2018)) (providing that the President may declare historic landmarks on federal land).

254 *See* Federal Property and Administrative Services Act of 1949, Pub. L. No. 81-152, 63 Stat. 377 (codified at 40 U.S.C. §§ 101, 121 (2018)) (together, providing that "[t]he President may prescribe policies and directives" to ensure "an economical and efficient" procurement system).

255 *See* International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, §§ 202, 203, 91 Stat. 1626, 1626-27 (Dec. 28, 1977) (codified at 50 U.S.C. §§ 1701, 1702) (providing that the President may bar transactions with foreign countries that present "an unusual and extraordinary threat").

256 *See* Fonzone Interview, *supra* note 9 (stating that, with respect to both executive orders and other directives, agencies "with expertise [are] consulted").

The Opinions Clause seems specifically designed to provide the President with such expert advice. The Clause empowers the President to demand from his "principal Officer[s]" a written opinion "upon any Subject relating to the Duties of their respective Offices"—that is, matters on which those officers are more likely to have expertise.[257] Moreover, the consultation among agencies increases the level and amount of expertise—and may lead to better policy (although that is by no means guaranteed).[258] As Neal Katyal has suggested, "[w]hen the State and Defense Departments have to convince each other of why their view is right . . . better decision-making" may result.[259]

Third, the President may conclude that listening to his subordinates—and respecting their wishes—will increase their willingness to implement presidential policies. This point relates to a structural reality of the presidency: "[T]he President alone and unaided [cannot] execute the laws. He must execute them by the assistance of subordinates."[260] Although many theories of Article II rest on the assumption that subordinates always do what the President says, some political scientists have questioned that assumption.[261]

That research is still ongoing. For present purposes, it is enough that the President himself may worry about implementation.[262] In 2007, Clinton complained that he was "frustrated" during his presidency because "I'd issue all these executive orders" and could "never be 100 percent sure that they

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257 U.S. CONST. art. II, § 2, cl. 1. As discussed, I assume that the President has discretion to determine which "Subject[s]" relate to an official's duties. *See supra* note 94.

258 Interagency consultation does not ensure good decisions. Although one can debate what qualifies as a "good" decision, I suspect virtually everyone today would agree that Franklin Roosevelt's Executive Order 9066 falls outside that category. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407, 1407 (Feb. 19, 1942) (authorizing the exclusion of "any person" from designated "military areas"). The order led to the internment of over 110,000 persons of Japanese ancestry, including 70,000 U.S. citizens. *See* GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 108-09 (2001). As Amanda Tyler recounts, when the Roosevelt Administration debated the draft order, Attorney General Francis Biddle repeatedly asserted that the federal government could not detain citizens, without a formal suspension of the writ of habeas corpus. *See* AMANDA L. TYLER, HABEAS CORPUS IN WARTIME 224-27 (2017). But the Attorney General lost that interagency battle and ultimately "capitulated." *Id.* at 227; *see also supra* notes 116–117 and accompanying text (describing how, from the 1930s on, executive orders were reviewed by the Attorney General for "form and legality").

259 Katyal, *supra* note 17, at 2317.

260 Myers v. United States, 272 U.S. 52, 117 (1926); *see also* Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 513 (1839) ("The President speaks and acts through the heads of the several departments . . . .").

261 *See* Joshua B. Kennedy, *"Do This! Do That!' and Nothing Will Happen": Executive Orders and Bureaucratic Responsiveness*, 43 AM. POL. RES. 59, 61 (2015) (finding that agencies "sometimes" obey executive orders and that "the conditions under which agencies will forego responding to a presidential directive are multi-faceted"); *see also* Rudalevige, *supra* note 111, at 157 ("If agencies are told, 'do this,' do they 'do that'? . . . . We don't know, as yet.").

262 *Cf.* William G. Howell, *Unilateral Powers: A Brief Overview*, 35 PRESIDENTIAL STUD. Q. 417, 433-36 (2005) ("All presidents . . . struggle to ensure that those who work below them will faithfully follow orders.").

were implemented."[263] As Rudalevidge suggests, a President may conclude that "[a]n agency that writes the orders . . . is surely more likely to carry them out."[264]

Finally, the President may rely on the interagency consultation process to avoid embarrassing (and perhaps politically costly) mistakes. Several of the officials I interviewed volunteered this point as the single most important reason for a President to engage in consultation. As one official put it, the process not only constrains but also "protects the President."[265]

B. *A Different Type of Check*

Whatever the reason, it is clear that Presidents have invited subordinate officials to play a key role in crafting presidential directives. And at the end of this interagency consultation process, Presidents have issued directives that do not fully advance the President's preferred policy. Instead, the President often opts to split the difference among agencies or substantially "soften" a directive. In this way, the interagency consultation process serves as a constraint on presidential power.

The process appears to be an example of what Katyal has dubbed the "internal separation of powers."[266] Notably, Katyal has emphasized the role of career civil servants. As he explains, the complex bureaucracy—replete with government officials who serve from administration to administration—can push back on "presidential adventurism."[267]

The analysis here suggests a different kind of internal check. Presidents themselves have invited the constraint—and not primarily from career civil

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263 Andrew Rudalevige, *The Administrative Presidency and Bureaucratic Control: Implementing a Research Agenda*, 39 PRESIDENTIAL STUD. Q. 10, 18 (2009) (quoting Clinton's statement).

264 Rudalevige, *supra* note 111, at 157. A few officials I interviewed found this view plausible. *See* Bies Interview, *supra* note 9 (asserting that Presidents consult with agencies in part because "you need 'buy in'" from officials who will implement the directive); *see also* Egan Interview, *supra* note 9 (stating that agency officials would not likely "flout" a presidential directive but might resist it by stating the "document is 'so flawed' that they can't adhere in current form").

265 Bies Interview, *supra* note 9 (asserting that the process "protects the President as much as it does" any agency); Gray Interview, *supra* note 9 (stating that "if process weren't followed, you can have problems" and that can lead to "embarrassment" for the President).

266 *See* Katyal, *supra* note 17, at 2318 ("outlin[ing] a set of mechanisms that create checks and balances within the executive branch").

267 *See id.* at 2317-18 ("Much maligned by both the political left and right, bureaucracy creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview."). Along similar lines, Jon Michaels has recently emphasized that the federal bureaucracy may serve as a check on political appointees. *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 543-47 (2015) (detailing how the civil service has "institutional, cultural, and legal incentives to insist that agency leaders follow the law . . . and refrain from partisan excesses").

servants but rather from political appointees.[268] The Opinions Clause, of course, is focused on those "principal Officer[s]," [269] and those officials seem to have the most influence over the crafting of presidential directives. When the President weighs in during the agency review process, he does so at the request of a Cabinet member or other top official.[270] That should perhaps not be surprising; a lower-level official is far less likely to have the President's ear. And although many officials may be invited to comment on a directive, the President hears primarily about the "high-level" views of, for example, Cabinet members.[271] As I have suggested, the President may be willing to listen to these officials, in part because he selected these "principal Officer[s]" for their positions.[272] So when these officials disagree with one another, they can at times push the President toward compromise.

Scholars have become increasingly interested in such subconstitutional constraints on presidential power. That is in part because many commentators have lost confidence in Congress's capacity to serve as a reliable "check," at least when the House, Senate, and President are controlled by the same political party.[273] So scholars have suggested alternative mechanisms for providing the "checks and balances" envisioned by the Madisonian scheme of separated powers. For example, Eric Posner and Adrian Vermeule have argued that politics and public opinion place

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268 Notably, both Katyal and Jon Michaels are skeptical about the capacity of political appointees to constrain presidential power. *See* Michaels, *supra* note 267, at 538-40 ("[T]here is reason to expect agency leaders to promote their boss's initiatives . . . ." rather than enforce statutory directives); *see also* Katyal, *supra* note 17, at 2332-33 (expressing concern about the rising "number of political actors in agencies" who serve for short periods and may lack the competence of career bureaucrats). The analysis here suggests that political appointees can constrain presidential power when the President invites the constraint.

269 U.S. CONST. art. II, § 2, cl. 1.

270 *See supra* subsections II.B.1–2.

271 *See supra* subsections II.B.1–2.

272 *See* U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States"); *see also supra* Section II.A.

273 *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2329 (2006) ("[W]hen government is unified . . . we should expect interbranch competition to dissipate."); *accord* Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1809–10 n.222 (2007); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 479 (2008). Some scholarship has questioned the premises of the "separation of parties" critique. *See* JOSH CHAFETZ, CONGRESS'S CONSTITUTION 28-35 (2017) (urging that each house of Congress does at times protect its institutional interests, and also making the deeper point that cooperation during periods of unified government may be "a feature of the American governing system, not a bug," if it reflects the wishes of the public); David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 5 (2018) ("[T]he behavior of federal officials cannot always be explained simply by partisan or ideological motives.").

important limits on what the President can do.[274] Jack Goldsmith and Gillian Metzger have argued that the President is constrained by a variety of forces, including the other branches, the bureaucracy, and external groups like the press, lawyers, and nonprofit organizations.[275]

This Article adds a "self-imposed" check to the mix. Through the interagency consultation process, Presidents have placed a constraint on their own unilateral action. Accordingly, presidential directives turn out to be less unilateral than one might have anticipated—at least under the system Presidents have developed since the 1930s.

C. *The Contingency of the Interpretive Method*

This final point leads me to an important observation, which further underscores the distinction between statutory and presidential textualism. Many statutory textualists argue that their method derives from the bicameralism and presentment process of Article I.[276] Under that view, statutory textualism is baked into the constitutional scheme.

The case for textualism in the context of presidential directives is different. Article II does not, standing alone, call for a textualist approach. Instead, the case for textualism depends on the manner in which the President has exercised his Article II power. The Opinions Clause invites the President to seek out advice from his subordinates. Pursuant to that authority, Presidents have created a complex scheme for issuing directives, relying on agency officials to draft, redraft, and bargain over the content of directives. At the end of this process, the President often opts for compromise among competing agency views. Courts, I argue, best give effect to that presidential decision by hewing closely to the text.

Article II thus invites, but does not require, the President to create this interagency consultation scheme.[277] Nor does Article II demand that the President opt for compromise. The existing scheme for crafting presidential directives, like many other aspects of administrative governance, depends on

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274 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 4-5, 12-13 (2010) (stating that these constraints include elections, public approval ratings, and presidential concerns about long-term legacy).

275 *See* JACK GOLDSMITH, POWER AND CONSTRAINT xi-xii, 209 (2012) (arguing that these forces not only constrain the President but have also legitimated the growth in presidential power); Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 77-85 (2017) (noting that these constraints ensure "good government" and serve "essential constitutional function[s]").

276 *See supra* Section I.C.

277 *See* U.S. CONST. art. II, § 2, cl. 1 ("[The President] *may* require the Opinion, in writing" of officials (emphasis added)); *supra* Section II.A.

a mix of political incentives, norms, and conventions, rather than legal requirements.[278] Accordingly, in contrast to prominent theories of statutory interpretation, this Article's case for textualism is contingent.

This point underscores the extent to which interpretive theory turns on both constitutional law and institutional setting. A significant change in institutional design may call for a different interpretive approach.[279] For now, however, courts should recognize that Presidents have for a mix of reasons opted to tie their own hands. Courts show respect for that presidentially created scheme—with its potential for compromise and less-than-effective policy—by adhering to the text.

CONCLUSION

Theories of interpretation depend on both constitutional law and institutional setting. For statutes, the focus is properly on Article I and the other rules and procedures governing Congress. By contrast, for presidential directives, the emphasis must be on Article II and the institutional mechanisms of the presidency. This Article contends that both the constitutional structure and that institutional setting point toward textualism. But whether or not one accepts that conclusion, the theoretical point holds. Any theory of interpreting presidential directives should begin with Article II. Contrary to the assumption of federal courts for over a century, presidential directives should not be treated just like statutes.

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278 *See supra* Section IV.A (explaining why the President consults with officials); *cf.* Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2221-30 (2018) (describing a "deliberative-presidency norm" that "requires a considered, fact-informed judgment in certain decisional domains"); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166-67 (2013) (emphasizing "the role of conventions in creating and protecting agency independence").

279 A full exploration of this contingency issue is beyond the scope of this Article. As discussed, there is good reason to assume that Presidents will—for a mix of practical and political reasons—continue to rely on the interagency consultation process. *See supra* Section IV.A. If nothing else, it can be politically costly for a President *not* to consult with multiple administrative officials about a directive. Accordingly, this Article offers an interpretive theory that builds on the existing institutional structure. But I flag this contingency issue for a few reasons. First, I want to stress an important distinction between statutory textualism and presidential textualism. Second, I wish to call attention to an issue that seems to be worth further examination. Scholars may wish to consider, for example, whether and the extent to which other interpretive theories are contingent on certain institutional arrangements.