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Presidential Power and Administrative Rulemaking

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The expanding scope of federal regulatory activities may require the development of innovative management and review techniques. In this decade alone, the government has undertaken major regulatory initiatives in such fields as environmental protection, occupational safety and health, and consumer product safety. These efforts exemplify a tendency of modern regulation to delve increasingly into highly complex and often controversial matters that affect broad segments of industry and the public.¹ The increasing sprawl of the federal agencies has challenged the effectiveness of the checks and balances designed by the Constitution. Understandably, criticism of the government's performance has not been lacking. Indeed, a general movement for "regulatory reform" has surfaced, advancing a number of diverse and, in part, longstanding criticisms.² Both Congress and the federal courts have initiated measures to control the regulatory bureaucracy.³

Several recent Presidents have taken tentative steps to join in this enterprise,⁴ and in doing so, they have raised a question that is

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1. See Schultze, *The Public Use of Private Interest*, HARPER'S, May 1977, at 43-44.

2. See generally, e.g., DOMESTIC COUNCIL REVIEW GROUP ON REGULATORY REFORM, *THE CHALLENGE OF REGULATORY REFORM, A REPORT TO THE PRESIDENT (1977)*; SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 94TH CONG., 2D SESS., *FEDERAL REGULATION AND REGULATORY REFORM 8-11* (Subcomm. Print 1976).

3. See pp. 456-59 *infra* (Congress) & pp. 459-61 *infra* (courts).

4. See pp. 63-65 *infra*. Presidents are not always impressed with their power over the bureaucracy. President Truman remarked that former General Eisenhower would encounter some surprises on assuming the Presidency: "He'll sit there . . . and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the Army." S. OPOTOWSKY, *THE KENNEDY GOVERNMENT* 27 (1961).

the subject of this article: what is the appropriate role of the President in regulatory policy formation by the federal agencies? This question presents a fundamental dilemma. The President needs enough power to execute the laws effectively; yet he must not destroy the essential balance of power among the branches of the government. The Watergate scandals vividly demonstrated the opportunity for abuse of presidential power. President Nixon's misuse of the Internal Revenue Service for political ends is one example of the harm that can result from a President's considerable practical leverage over the agencies.⁵ Congress reacted to the Nixon Presidency by imposing new statutory curbs on presidential action.⁶ These recent restrictions, along with traditional interbranch competition to control the agencies, suggest that Congress is unlikely to grant the President substantial new statutory powers to manage regulation. Thus, a definition of the chief executive's role in the regulatory process must draw upon the balance of powers contained in the existing scheme of statutory and constitutional authority.

Additional considerations in an analysis of presidential power are the distinctive functions and practical competence of each of our interrelated governmental institutions. The roles of other institutions that oversee the agencies must be considered in relation to the role of the Presidency. Indeed, it is inappropriate and unjustifiable for any branch to assert a power that is beyond its practical competence, that excessively intrudes on a function reserved to another branch, or that impairs the exercise of constitutional checks by the other branches.

This article begins by identifying the need for presidential involvement in agency rulemaking and then examines the relative efficacy of agency oversight functions fulfilled by the three constitutional branches of government and by regulated industries and the public. Employing the separation of powers doctrine as a framework for legal analysis, the article identifies both the relatively clear and the more ambiguous boundaries of permissible presidential action. This framework permits a critical examination of the Supreme Court cases that bear most directly on the President's power to supervise agency action—those defining his power to remove agency members from

5. See *Summary of Information: Hearings Before the House Comm. on the Judiciary Pursuant to H.R. Res. 803, a Resolution Authorizing and Directing the Committee on the Judiciary to Investigate Whether Sufficient Grounds Exist for the House of Representatives to Exercise its Constitutional Power to Impeach Richard M. Nixon, President of the United States of America*, 93d Cong., 2d Sess. 141-43 (1974).

6. See Zeidenstein, *The Reassertion of Congressional Power, New Curbs on the President*, 93 *POLITICAL SCI. Q.* 393 (1978); p. 492 *infra*.

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office. The analysis concludes that the removal cases take an unduly rigid approach to separation of powers issues. Because a rigid approach is unsuited to modern needs of government, the Court should take a more flexible approach, for which there is warrant in recent constitutional cases. Such an approach would involve evaluating a series of factors, including the President's capacity to exercise a given power effectively, the presence or absence of implied statutory authority, the procedural or substantive effects of the proposed action, the nature of the regulatory program involved, and the availability of procedural safeguards against secret *ex parte* contacts. A consideration of primary importance is whether the other branches can effectively exercise their checks in order to limit and guide presidential involvement in rulemaking.

I. The Need for Presidential Involvement in Rulemaking

The federal agencies increasingly use rulemaking rather than adjudication to set regulatory policy; procedural differences between the two forms of agency action raise problems addressed by regulatory reform efforts. The Administrative Procedure Act (APA) imposes distinct requirements for adjudication and rulemaking.⁷ Adjudication must be conducted through a full trial-type hearing with a decision confined to the record. "Informal" rulemaking, in contrast, is usually subject only to simple requirements that the agency publish notice of a proposed rule, afford the public an opportunity to comment on it, and include a concise statement of basis and purpose with the final rule.⁸

Agencies now tend to rely on rulemaking to set policy partly because Congress has created many new regulatory programs that are better implemented by general directives than by case-by-case deter-

7. 5 U.S.C. §§ 551-706 (1976).

The courts have tried to maintain a line between agency "proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244-45 (1973) (reviewing *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), and *Londoner v. City of Denver*, 210 U.S. 373 (1908)).

Yet much agency action falls within neither category; the APA does not provide special procedures for such "informal" executive actions as consent settlements and contracts. See Pedersen, *Formal Records and Informal Rulemaking*, 85 *YALE L.J.* 38, 39-41 (1975).

8. 5 U.S.C. § 553 (1976).

"Rulemaking" here will refer to matters governed by these statutory procedures, unless otherwise indicated. In contrast to the "informal" rulemaking procedures summarized in text, statutes occasionally subject rulemaking to the adjudication procedures of the APA. See *id.* § 553(c). Such "formal" rulemaking is beyond the scope of this discussion.

minations.⁹ In addition, the agencies hope to avoid the delays and burdens of adjudication.¹⁰ But precisely because rulemaking provides a policymaking method that bypasses the procedural restrictions imposed on adjudication, there is cause for concern over the adequacy of public participation in and external review of rulemaking. Rulemaking, unlike adjudication, is not immune to outside intervention¹¹ and instead is open to the influence of persons outside the agency—possibly including the President. This discussion will focus on the acute regulatory issues raised in rulemaking, and on the presidential role suggested by the inadequate responses of the other branches to those issues.

A. *The Call for Regulatory Reform*

Four major criticisms of federal regulatory practices invite presidential involvement. First, as a result of the widespread opinion that appointed bureaucrats are not sufficiently responsive to the public's will, there have been attempts to increase the political accountability of the agencies.¹² Underlying these efforts is a growing recognition that even highly technical regulatory decisions ultimately involve political choices among competing economic and social goals.¹³ For example, the Environmental Protection Agency's (EPA) limitations on the acceptable lead content of gasoline embody a judgment on the extent to which uncertain long-term risks to the public health justify sacrificing the fuel economy provided by lead additives.¹⁴ Recognizing that judgments of this kind depend on values as well as

9. For example, technical standards for public health and safety are often set by rulemaking. See 15 U.S.C. §§ 2051-2081 (1976) (Consumer Product Safety Commission).

10. Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974). Agencies have discretion to choose between rulemaking and adjudication when both are authorized. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

11. The APA, 5 U.S.C. § 557(d) (1976), forbids ex parte interference in adjudication. Before the adoption of this section, a due process ground for such a result was invoked in *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). There also have been White House efforts to forbid staff interference with agency adjudication. See Memorandum for the White House Staff, Subject: Contacts between the White House and the Independent Regulatory Agencies, from Assistant to the President Peter M. Flanigan (May 21, 1969), reprinted in *ITT Continental Baking Co.*, 82 F.T.C. 1188, 1191 (1973).

12. See, e.g., *Congressional Review of Administrative Rulemaking: Hearings on H.R. 3658 & H.R. 3231 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

13. Bazelon, *Coping with Technology Through the Legal Process*, 62 CORNELL L. REV. 817, 819-20 (1977).

14. See generally *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir.), cert. denied, 426 U.S. 911 (1976).

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technical expertise, Congress has taken steps to increase public participation in agency rulemaking,¹⁵ and to improve its own oversight of the agencies,¹⁶ sometimes going so far as to review individual regulations for a possible legislative veto.¹⁷

A second concern has been that the agencies have not been sufficiently careful to ensure that their rules are legally justifiable and will work in practice. Here, too, Congress has imposed new constraints on the rulemaking process, such as requirements that agencies assemble a record to support their rules and that they survive heightened judicial review.¹⁸ These first two concerns and the reforms they have generated are difficult to reconcile—one is value-laden and political, the other is rational and legalistic. Although these purposes can be accommodated, the tensions between them will suffuse the discussion here.

Third, there is a perceived need for greater coordination of policy among agencies. Overlapping or fragmented agency jurisdiction has resulted in conflicting rules or the absence of any federal policy at all on some important matters.¹⁹ For example, federal regulation of transportation is entrusted to a Cabinet department and three independent agencies, none of which has the statutory authority to resolve conflicts or to take comprehensive responsibility.²⁰ Small wonder that we have no national transportation policy. Congress can alleviate such problems by statutory consolidation, but it cannot eliminate them. Creating a new Department of Energy²¹ to perform functions previously exercised by many other agencies does not resolve the

15. See pp. 489-90 *infra*.

16. See, e.g., 2 SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION (Comm. Print 1977) [hereinafter cited as STUDY ON FEDERAL REGULATION].

17. Although Congress can reverse a regulation through legislation, it can accomplish the same purpose but avoid the burdens of legislation through the device of the legislative veto. If Congress authorizes one of its houses to veto a regulation, the assent of the other house and of the President (or the override of his veto) becomes unnecessary. See generally Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977). Giving the President a more active role in regulatory policymaking may simply be a way to reinstate the balance of powers that has been disrupted by the invention of the legislative veto.

18. See pp. 489-90 *infra*.

19. See generally 5 STUDY ON FEDERAL REGULATION, *supra* note 16.

20. See Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947, 978-92 (1971).

21. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977). Consolidation has practical and political limits—although generally consolidating energy matters under the aegis of a new department, this statute created a new independent commission within the Department for some functions.

problem of coordinating the Department's rules with those of the EPA.²²

Finally, the regulatory reform movement has called for particular substantive changes in regulation. These range from recurrent criticisms of particular agency rules, such as the Interstate Commerce Commission's (ICC) "backhauling" rules that force some trucks to return empty from delivery trips,²³ to broader demands for partial or complete deregulation of entire industries, such as the airlines.²⁴

B. *Oversight of Agency Regulation: Congress, the Public, and the Courts*

Efforts to reform regulation have relied on Congress, citizen action, and the courts, but the efficacy of these efforts has been limited.

1. *Congress and the Public*

Because the regulatory agencies were created through congressional delegations of power, Congress has set up the machinery of oversight committees to review the conduct of the agencies. For this purpose, Congress employs "substantive" committees that focus on the statutes within their subject matter jurisdiction and review agency conduct to appraise the need for change.²⁵ When controversy arises over agency policy, these committees hold oversight hearings; as a consequence, an agency may have to justify its practices even if no new legislation is seriously considered.

This concentration of the oversight function in congressional committees accounts for some deficiencies in its performance. First, the complex and unwieldy committee structure itself seriously hampers

22. Although the EPA could be merged with the new Department, it is often thought wise to retain a separate status for an agency having an advocacy role. 5 *STUDY ON FEDERAL REGULATION*, *supra* note 16, at 10.

Congress could mandate coordination of regulatory actions conducted by different agencies through statutory language creating particular programs, but the effectiveness of this technique is limited. *See id.* at 321, 323, 326 (explaining coordination purpose in Toxic Substances Act).

23. *See generally Regulatory Problems of the Independent Owner-Operator in the Nation's Trucking Industry (Part 1): Hearings Before the Subcomm. on Activities of Regulatory Agencies of the House Comm. on Small Business, 94th Cong., 2d Sess. (1976).*

24. *See, e.g.,* Airline Deregulation Act of 1978, Pub. L. No. 95-504; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, AIRLINE DEREGULATION, H.R. Doc. No. 92, 95th Cong., 1st Sess. (1977).

25. For general discussion of congressional oversight practices, see H. LINDE & G. BUNN, *LEGISLATIVE AND ADMINISTRATIVE PROCESSES* (1976); M. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY* (1976). A different oversight function is performed by the House and Senate appropriations committees. *See p. 458 infra.*

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congressional efforts to coordinate policy.²⁶ A single federal agency may report to numerous committees and subcommittees, each having a different policy bent. To the extent that effective oversight is performed by committees, review is conducted without the primary checks on the fairness of legislative policy that are embodied in the constitutional structure of Congress—national representation in each house, and the bicameral structure.²⁷ As sub-units of Congress, committees provide narrower political accountability than does either house of Congress; indeed, a committee often reflects the views of a single powerful chairman or member.²⁸ Moreover, committees are sometimes dominated by members sympathetic to an agency or its regulated industry, a situation that further reduces the prospect that oversight will be conducted in the general public interest.²⁹

Apart from structural problems with congressional oversight, there is little in its traditional exercise to inspire confidence. Regulation has not attracted sustained attention in Congress.³⁰ Oversight hearings have occurred sporadically, although they have been more frequent and regular in recent years.³¹ Consequently, congressional oversight has not stimulated the ongoing policy dialogue between legislature and agency that would be necessary to give coherent direction to agency policymaking.³² Instead, oversight has often blocked agency policy initiatives without providing an alternative course of action.³³ Stalemate follows.

Congressional oversight hearings do not, however, exhaust the techniques available to Congress. It has two other explicit constitutional powers that can influence agency policymaking: budgetary appropriations, needing the approval of both houses, and the Senate's right of

26. See HOUSE SELECT COMM. ON COMMITTEES, REPORT ON COMMITTEE REFORM AMENDMENTS OF 1974, H.R. REP. NO. 916, 93d Cong., 2d Sess. (1974); 123 CONG. REC. S2295 (daily ed. Feb. 4, 1977) (Sen. Huddleston); Adams, *Sunset: A Proposal for Accountable Government*, 28 AD. L. REV. 511, 539 (1976); Ribicoff, *Congressional Oversight and Regulatory Reform*, 28 AD. L. REV. 414, 420 (1976).

27. In *The Federalist*, James Madison explained the framers' attempt to mitigate the effects of faction in the structure of Congress. THE FEDERALIST NO. 10 (J. Madison); see McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119, 1155 (1977).

28. See Bruff & Gellhorn, *supra* note 17, at 1418; Robinson, *The Federal Communications Commission: An Essay on Regulatory Watchdogs*, 64 VA. L. REV. 169, 179-80 (1978).

29. See Robinson, *supra* note 28, at 179-82. This resembles the problem of factions that the framers sought to avoid. See p. 461 & note 52 *infra*.

30. See 2 STUDY ON FEDERAL REGULATION, *supra* note 16, at 109. Nor does regulation receive consistent presidential attention. See p. 469 *infra*.

31. 2 STUDY ON FEDERAL REGULATION, *supra* note 16, at 80-81, 120-21.

32. Robinson, *supra* note 28, at 179-82.

33. Bruff & Gellhorn, *supra* note 17, at 1420-22.

advice and consent to presidential appointments.³⁴ Neither power has led to effective congressional review of regulatory policy. Yearly budgetary hearings in both houses provide an opportunity for the appropriations committees to review agency performance, and to affect future policy either by changing appropriation levels or by expressing pleasure or displeasure with past actions.³⁵ The appropriations process tends, however, to consider justifications for incremental budget requests rather than the wisdom of basic regulatory policy. Also, appropriations deliberations tend to focus on a few relatively expensive programs such as national defense, social security, and welfare. The other potential source of congressional influence has had even less effect: the Senate's advice and consent function, which theoretically gives Congress a voice in selecting those who manage the agencies, has usually been exercised in a perfunctory fashion.³⁶

Congressional frustration with the deficiencies of oversight has manifested itself in repeated experiments with the legislative veto as an effort to acquire subsequent control on delegated power. Serious constitutional and policy difficulties surround that device;³⁷ not the least of these problems is the claim that the President is effectively denied the opportunity to exercise his standard review of legislation.

Other recent congressional attempts to improve regulatory policy-making include statutes that require agencies to follow more elaborate rulemaking procedures than those prescribed in the APA.³⁸ This effort may increase the role of citizens in creating more comprehensive records and more responsive agency rules. It may guard against the "capture" of regulatory policymaking by regulated industries, which exert better organized and more sustained pressure on regulators than does the diffused general public.³⁹ But broadening interest representation before the agencies and increasing the effectiveness of public lobbyists cannot guarantee actual agency responsiveness to new-

34. U.S. CONST. art. I, §§ 7, 8; *id.* art. II, § 2.

35. The appropriations committees sometimes condition the use of appropriated funds. See 2 STUDY ON FEDERAL REGULATION, *supra* note 16, at 18-43.

36. Robinson, *supra* note 28, at 183.

37. See generally Bruff & Gellhorn, *supra* note 17.

38. See pp. 489-90 *infra*.

39. See Robinson, *supra* note 28, at 175, 188-90. The point is well summarized in R. NOLL, REFORMING REGULATION 41 (1971):

Most regulatory issues are of deep interest to regulated industries, with a very substantial amount of income . . . riding on the decision. The stake of the general public may in the aggregate be even higher, but it is diffused among a larger number of unorganized individuals. . . . The motivation of a single firm to fight an unfavorable regulatory decision is very high, while a regulatory decision unfavorable to the general public is unlikely to generate enough interest to cause a general public interest to be raised.

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ly represented interests.⁴⁰ Moreover, these reforms complicate and delay administrative proceedings and create a risk of impairing agency decisionmaking.⁴¹ Even if these reforms achieve their purpose of making agencies more responsive to more interest groups, they will do little to promote coordinated and coherent agency policymaking. To some extent, the diversity of interests represented both before the agencies and in Congress may prevent effective initiatives to coordinate policy by either ad hoc reform groups or Congress itself.

2. *The Federal Courts*

Judicial review of agency action is limited. Because the legislature delegates discretion to administrators, not to reviewing courts, the courts are not supposed to supplant administrative discretion over policy matters by substituting judicial judgment for that of an agency.⁴² The courts respond only to a challenge to a particular agency action; the judicial strategy is to determine whether the action was selected by fair procedures within constitutional and statutory limits and whether the action was substantively reasonable.⁴³ This judicial approach is not designed to promote coordination of policy or to respond broadly to the calls for regulatory reform.

More extensive efforts to influence the process of regulatory policymaking have been undertaken by lower courts but rejected by the Supreme Court.⁴⁴ A number of lower federal court decisions imposed procedural requirements on informal rulemaking beyond those required by the APA.⁴⁵ Often these judicially imposed requirements resembled those usually associated with adjudication, such as opportunity for cross-examination and maintenance of a complete record. The courts took this initiative because they often found it difficult to review challenged rules effectively, especially because the APA does

40. See Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1760-90 (1975).

41. *Id.* at 1789-90.

42. G. ROBINSON & E. GELLHORN, *THE ADMINISTRATIVE PROCESS* 227-28 (1974). This restrained view of judicial review is an ideal that is not always exhibited in practice, but it does guide the courts. See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

43. G. ROBINSON & E. GELLHORN, *supra* note 42, at 33.

44. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978).

45. See, e.g., *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). See generally Pedersen, *supra* note 7; Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

not provide for any formal record to accompany rulemaking.⁴⁶ The courts lacked confidence in the seriousness with which agencies had taken public comments and the thoroughness with which agencies had considered the issues underlying promulgated rules. The resulting judicial application of a high gloss to the APA was brought to an abrupt halt by the Supreme Court in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*⁴⁷

In *Vermont Yankee*, the Court held that the lower federal courts do not have the authority to order agencies to engage in rulemaking procedures beyond those specified in the APA or another relevant statute.⁴⁸ The Court emphasized that the APA's provisions embody legislative compromise, and establish the maximum procedures that Congress has chosen to apply generically. Beyond these general statutory dictates, Congress may impose additional procedures for a particular statutory program⁴⁹ and agencies may choose to employ more elaborate procedures, but the courts may not impose them. The Court was concerned that without this restriction on the judiciary, unwarranted judicial intrusion into agency decisionmaking could usurp the political authority of the agencies to set policy. In addition, the Court worried that enlarged judicial supervision of challenged agency actions would unduly restrict all agency choice of rulemaking procedures; retroactive judicial imposition of special procedures in some cases could force agencies to act defensively by adopting maximum procedures in every case.⁵⁰

Judicial review is confined within special limits by both statutory and constitutional doctrines.⁵¹ Had the *Vermont Yankee* Court considered presidential review of agency rulemaking, in contrast, it might

46. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 754-55 (1975).

47. 435 U.S. 519 (1978).

48. The courts are to continue, however, to review agency rules for arbitrariness, see 5 U.S.C. § 706(2)(A) (1976), and may remand for an agency's failure to explain rules sufficiently, see 435 U.S. at 535 & n.14.

49. See, e.g., 15 U.S.C. § 57a(b), (c) (Supp. V 1975) (stringent procedures for FTC rulemaking).

50. 435 U.S. at 547-48.

51. See, e.g., B. SCHWARTZ, ADMINISTRATIVE LAW § 204 (1976).

One effect of *Vermont Yankee* is a renewal of debate over the proper limitations on judicial review of agency activity. Compare Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805, 1810 (1978) (courts should review agency choices for analytic support; record requirement itself is more expansive than APA requirements) with Bye, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823, 1830, 1831-32 (1978) (court's role does not include imposing requirements for more adequate record; requirement of record beyond APA standards is mistake).

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have articulated a relatively broad scope of executive supervision of regulatory practices. Indeed, to the extent that *Vermont Yankee* restricts the oversight function of the federal courts on the grounds that they lack the authority to affect policy decisions, one of the political branches may appropriately assume the initiative, thereby reducing pressure on the courts to step beyond the limits of traditional judicial review. Furthermore, differences in the institutional structure of the different branches suggest a different role for each. The institutional structure of the courts works against effective supervision of rulemaking because the courts must wait for a suit brought to challenge existing circumstances. The President, in contrast, may impose prospective requirements on the agencies by executive order. By using this option, which is not available to the federal courts, the President may be able to perform some oversight functions forbidden to the courts and ineffectively performed by Congress.

C. *Regulatory Oversight by the President*

Although some of the calls for regulatory reform may be satisfied by congressional action, public pressure, or judicial review, presidential initiatives could bolster other checks on the regulatory process and perform a coordinating, supervisory function that is not currently being discharged. Some characteristics of the President's position in the country and in the government make him uniquely capable of assuming a role that is distinct from other forms of oversight.

First, he has a national constituency not shared by any of the particular congressmen and committees that perform congressional oversight. The framers of the Constitution accorded the President a power to veto legislation partly in order to negate the effects of factions in Congress,⁵² yet that same problem can persist if a faction controls a congressional oversight effort. The President's national constituency does not guarantee that he will be equally responsive to all interest groups, but adding his political base to the existing influences on a particular issue can only enrich the political accountability of agency action in general. It must be recognized that presidential participation will not always negate factional influences and may, at times, reinforce them. This fact suggests the need to qualify

52. See THE FEDERALIST No. 10 (J. Madison); *id.* No. 73 (A. Hamilton). The point is well summarized in *Myers v. United States*, 272 U.S. 52, 123 (1926):

The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature

presidential intervention, but it does not justify preventing it entirely.

A further benefit of a presidential directive influencing regulation is that it prompts the consideration of policy issues by Congress as a whole. Policy stalemates often beset committee-agency relationships. If the President were to issue a directive to an agency, Congress as a whole would have to pass legislation to reverse it—and Congress must be prepared to override his veto in order to countermand his position. Shifting the burden in this way would reserve for Congress the ultimate legislative power, but would reduce the likelihood that no affirmative policy decision will be made.

Finally, the President has a unique responsibility to superintend the execution of many statutes at once. As Chief Justice Vinson observed, “[u]nlike an administrative commission confined to the enforcement of the statute under which it was created, or the head of a department when administering a particular statute, the President is a constitutional officer charged with taking care that a ‘mass of legislation’ be executed.”⁵³ This argument that the President has some implied statutory or constitutional authority to harmonize the welter of statutes, or to act interstitially at times, has a functional basis because legislation necessarily distributes power in a somewhat fragmentary fashion, and cannot resolve all the future problems of coordinating policy under separate statutes.⁵⁴ The President has a unique vantage point from which he can focus on a vital issue that falls within the jurisdiction of a variety of executive and independent agencies, each having power to deal with only part of the problem.⁵⁵

The underlying legal authority for presidential involvement in regulation may be found in Article II of the Constitution, which charges the President to “take Care that the Laws be faithfully executed.”⁵⁶ Giving meaning to this clause is a task undertaken in the

53. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

54. These characteristics of statutes cannot be removed by extremely broad drafting if the delegation doctrine retains any force. See B. SCHWARTZ, *supra* note 51, §§ 11-19.

55. See pp. 455-56 *supra*.

56. U.S. CONST., art. II, § 3. Article II states:

Section 1. The executive Power shall be vested in a President of the United States of America. . . .

....

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States [H]e 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

....

[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall

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following elaboration of a range of possible presidential initiatives for improving federal regulation.

II. Presidential Initiatives and the Separation of Powers

A. *Procedural and Substantive Directives*

Presidential supervision of agency rulemaking might take the form of either procedural or substantive directives. An example of a procedural directive is President Carter's Executive Order No. 12,044, optimistically titled "Improving Government Regulations."⁵⁷ The Order imposes a number of procedural requirements on the rulemaking activities of federal agencies within the executive branch, but does not apply to the independent regulatory agencies, which have traditionally been largely exempt from presidential direction.⁵⁸ It adds flesh to the APA's rather lean procedures for informal rulemaking. The Order attempts to ensure that the opportunity for public participation in rulemaking will be meaningful by requiring that participation occur at an early stage in the drafting process and by setting a minimum duration for the comment period in some cases. There are also provisions for more careful review of proposed rules within the promulgating agency. Under some circumstances the Order requires an analysis of the anticipated impact of a pro-

appoint Ambassadors, . . . and all other Officers of the United States whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. . . .

Section 3. He shall from time to time give to the Congress information of the State of the Union and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ; he shall take Care that the Laws be faithfully executed

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors.

Presidents have not used the appointment power of § 2 consistently to shape regulatory policy. *See* Robinson, *supra* note 28, at 183-84, 187-88. Instead, appointments of persons without visible qualifications frequently are used to cancel political debts and to avoid the controversy that attends nomination of persons with defined views. *Id.* The presidential oversight functions discussed in this article seem more adaptable to resolving particular policy issues than does the oblique control provided by the appointments power.

The framers' reasons for including such minor powers as the power to require opinions of department heads are not known. *See* *Myers v. United States*, 272 U.S. 52, 207 (1927) (McReynolds, J., dissenting). These provisions were later characterized by Justice Jackson as "trifling" specifics, "inherent in the Executive if anything is." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 & n.9 (1952) (Jackson, J., concurring).

57. 43 Fed. Reg. 12,661 (1978).

58. *See* pp. 498-99 *infra*.

posed rule and consideration of alternative approaches. Agencies must also engage in periodic reviews of their existing regulations to assess the need for their change or elimination.

Another example of a procedural directive was President Ford's inflation impact statement requirement, also imposed by executive order, and designed to force executive branch agencies to take account of economic matters outside their narrow statutory spheres.⁵⁹ Inflation impact statements prepared under this program were reviewed by the President's Council on Wage and Price Stability.⁶⁰ There are signs that the program influenced some agency decisions, although it is difficult to isolate the effects of other variables.⁶¹ At the very least, the Order stimulated improvements in the economic analysis capabilities of some affected agencies.⁶²

Another form of procedural requirement can promote coordination among agencies and can also influence the substance of regulation. Imposition of interagency review and comment procedures forces the subject agency to respond to the comments of other agencies in explaining its rules, even though the reviewing agencies are not granted the power to mandate changes in the rules. An example of this is "Quality of Life" review, instituted by the Office of Management and Budget (OMB) in 1971 to review environmental regulations.⁶³ The history of Quality of Life review reveals a tendency for "procedural" techniques such as interagency review to pressure the subject agency toward substantive change, or to provide an opportunity for those opposed to statutory programs to delay their implementation.⁶⁴ The EPA circulated proposed regulations to other agencies for comment and responded to their criticisms. The Department of Commerce was a frequent and hostile participant, often reflecting industry opposition to proposed EPA rules. If EPA's resolution of the issues dissatisfied other agencies, they called for a meeting, presided over by OMB officials and sometimes involving White

59. Exec. Order No. 11,821, 3A C.F.R. § 203 (1974). This order was extended to December 31, 1977, by Exec. Order No. 11,949, 3 C.F.R. § 161 (1976).

60. The Council found the quality of inflation impact statements to be uneven at first, but it noted improvement over time. COUNCIL ON WAGE AND PRICE STABILITY QUARTERLY REPORT No. 7, at 48 (1976).

61. Note, *The Inflation Impact Statement Program: An Assessment of the First Two Years*, 26 AM. U.L. REV. 1138, 1160-61 (1977).

62. *Id.* at 1161-62.

63. Although theoretically designed for wider application, in practice Quality of Life review focused almost exclusively on EPA regulations. See note 64 *infra* (citing sources).

64. See generally J. QUARLES, *CLEANING UP AMERICA: AN INSIDER'S VIEW OF THE ENVIRONMENTAL PROTECTION AGENCY* 117-42 (1976); *Office of Management and Budget Plays Critical Part in Environmental Policymaking, Faces Little External Review*, 7 ENVIR. REP. (BNA) 693 (1976).

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House staff. Once the disputed issues were resolved by meetings, proposed regulations were published in the Federal Register. The procedure was repeated before the promulgation of final regulations.

Because agency comments were not made part of the public record and often occurred before notice of proposed rulemaking, Quality of Life review had low visibility. The procedure effected some substantive changes and improved the quality of supporting analysis produced by the agency to justify its proposals. Although it caused some delay in the regulatory process, it did permit the EPA to maintain its autonomy in resolving substantive issues that it considered important.⁶⁵

Thus, procedural requirements can have important effects on the substance of agency policy, but they are distinguishable from direct invasions of an agency's authority to determine the substance of its rules.⁶⁶ A substantive presidential order would direct an agency to adopt, alter, or rescind a particular rule. The substantive directive could occur as an ad hoc response to a highly controversial rule, or as part of a regular procedure for policy directives seeking the overall coordination of federal policy. To date, Presidents have engaged only in sporadic, ad hoc intervention,⁶⁷ but proposals for more thoroughgoing policy coordination surface periodically.⁶⁸

B. *Issues Raised by Presidential Initiatives*

Many of the avenues of presidential action that have been proposed and some that have been taken have encountered problems concerning the legal and practical boundaries of presidential authority. For example, President Carter's Executive Order No. 12,044 cites no specific authority as its basis,⁶⁹ and at best relies on authority implied by similar statutory requirements, such as environmental

65. See *Implementation of the Clean Air Act Amendments of 1970: Hearings Before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong., 2d Sess. pt. 1, at 231-32 (1972) (EPA Administrator Ruckelshaus asserting agency independence from OMB).

66. Compare pp. 489-95 *infra* with pp. 495-98 *infra*.

67. For example, when President Ford learned that the Department of Health, Education, and Welfare had prohibited father-son or mother-daughter activities in public schools, he ordered immediate suspension and reexamination of the rule. *Washington Post*, July 8, 1976, § A, at 1, col. 5.

68. E.g., Cutler & Johnson, *Regulation and the Political Process*, 84 *YALE L.J.* 1395 (1975). See generally K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* §§ 1.04-14, 1.09-1 (1976); K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.04-4 (Supp. 1970).

69. The Order simply begins, "As President of the United States of America, I direct each Executive Agency to adopt procedures to improve existing and future regulations." 43 *Fed. Reg.* 12,661 (1978).

impact statements.⁷⁰ Can the President act without explicit authority?⁷¹ Another question concerning the scope of presidential authority was raised by the original draft of the Order which suggested that it would apply to the independent regulatory agencies.⁷² The final version precluded this possibility, but many of the general demands for regulatory reform would require supervision of these traditionally independent bodies. Does the traditional status of the independent agencies preclude presidential intervention?⁷³

Further questions arise from the possible substantive effects of presidential directives. The indirect substantive effects of an ostensibly procedural directive and the impact of an explicitly substantive directive may exceed the limits of executive authority in particular areas. Moreover, substantive effects of presidential initiatives may be unfair to interested parties by leaving them without timely notice or an opportunity to respond to the presidential position. This danger was manifested in an incident during the Nixon Administration:

In 1971 Henry Ford II made a personal visit to the White House complaining that the cumulative effect of Federal regulations . . . would soon double the cost of the Ford Pinto and would require comparable increases on other models. Soon after the White House took a direct interest in [the National Highway Traffic Safety Administration's] passive restraint rulemaking. A series of high level briefings and exchanges of views took place between NHTSA, DOT, and White House officials. Then Secretary of Transportation John Volpe, a firm advocate of the passive restraint proposal, was reported to have returned despondently from sessions with White House officials who rejected his efforts to defend the proposal. Eventually, in a White House confidential memorandum to DOT, Presidential aides John Ehrlichman and Peter Flanigan ordered both a delay in passive restraints and a requirement for the ignition interlock. NHTSA duly complied.⁷⁴

70. 42 U.S.C. § 4332 (1970 & Supp. V 1975).

71. See pp. 490-91 *infra*.

72. The Order was published in the Federal Register in draft form for public comment, 42 Fed. Reg. 59,740 (1977). It was ambiguous and might have applied to the independent agencies; the President sought public comment about whether it should be applied to them. As finally issued, the Order exempted them, with the explanation that the President sought to avoid a "confrontation with Congress over the applicability of the order to the independent regulatory agencies." 43 Fed. Reg. 12,670 (1978). He accompanied the Order with a letter to the chairmen of the independent agencies, asking them to apply the Order's procedures voluntarily. President's Letter to Heads of Independent Regulatory Agencies, 14 WEEKLY COMP. OF PRES. DOC. 563-64 (Mar. 27, 1978).

73. See H.R. REP. No. 1980, 79th Cong., 2d Sess. 23-26 (1946); S. REP. No. 752, 79th Cong., 1st Sess. 13-16 (1945).

74. SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS, HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, FEDERAL REGULATION AND REGULATORY REFORM 187-88 (Subcomm. Print 1976) (footnotes omitted).

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This episode demonstrates the potential for White House staff to become deeply—and perhaps improperly—involved in the rulemaking process. Formal presidential supervision of rulemaking would tend to increase informal contacts between White House staff and the agencies, especially regarding substantive directives.⁷⁵ These contacts might be secret, or at least undisclosed by the administrative record. If the consequence were to deny interested persons fair treatment, to deflect an agency from its statutory grounds for decision, or to impair the ability of the courts to review rules, a violation of the governing statutes could result. To avoid this danger, what procedural constraints should there be on presidential intervention?⁷⁶

C. *The Contours of Presidential Power: Competing Theories of the Presidency*

Questions regarding the scope of presidential power reveal the underlying problem: since the Presidency is not a clearly defined office, each occupant places his personal stamp on it and each historical period leaves its mark. The conception of executive power bequeathed by the framers of the Constitution is ambiguous.⁷⁷

At a level of great generality, there is consensus that the framers' purpose in drafting Article II was to strengthen the executive and provide a more effective check on the legislature than the checks that had been available under the Articles of Confederation.⁷⁸ By

75. Cf. Bruff & Gellhorn, *supra* note 17, at 1409-12 (legislative veto provisions tend to cause increased informal contacts between congressional and agency staffs).

76. See pp. 500-06 *infra*.

77. As Justice Jackson lamented,

[a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (1952) (Jackson, J., concurring) (citation omitted). Indeed, Justice Jackson can be charged with understating his case: an additional source of confusion and indecisiveness are the broad dicta frequently elaborated in Supreme Court decisions concerning the limits of presidential power. Such overstatements may derive from the fact that presidential power has received its outlines in a series of isolated "great cases." See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926).

78. See, e.g., R. BERGER, EXECUTIVE PRIVILEGE 49-59 (1974) (Article II established strong executive with enumerated powers in order to protect against overpowerful legislature and also executive tyranny); E. CORWIN, THE PRESIDENT, OFFICE AND POWERS 1781-1957, at 5-16

1781, experience had demonstrated that the Articles of Confederation, which provided for no national executive, were an overreaction to the perceived executive tyranny against which the Revolution had been fought.⁷⁹ The Constitution's framers therefore wanted to create an effective national executive, but they did so in a climate of marked apprehension about excessive executive power. No evidence remains of the extent to which the framers thought it proper for the President to supervise policy decisions of his subordinates. Even if such evidence were available, it would have only limited persuasiveness in resolving contemporary problems within an executive establishment with dimensions and activities that were not then foreseen.⁸⁰

Today, the President has to play many roles, including "Commander in Chief, primary proposer of legislation and chief lobbyist, top executive in the executive branch, guardian of the economy, negotiator with other nations, head of state, party leader, and moral leader."⁸¹ Minimally, as chief political executive, the President is required "to annually make a relatively small number of highly significant decisions—among them, setting national priorities, which he does through the budget and his legislative proposals, and devising policy to ensure the security of the country."⁸²

If the President is to perform these roles and carry through the national priorities that he sets, he needs the power to influence the direction of federal regulatory policies in some fashion. But the grave contemporary concern is that the chief executive will seek and acquire the power to turn the office into an "Imperial Presidency."⁸³ For domestic regulation, such a broad view would hold that the President might issue agencies substantive or procedural orders of any kind not explicitly forbidden by legislation. Recognition of such a "roving

(4th ed. 1957) (Article II created one of three reciprocally limiting government branches); Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 369 (1976) (there is need for limited but strong executive power to control the excesses of other branches).

79. See, e.g., THE FEDERALIST No. 48 (J. Madison) at 322 (Modern Library ed. 1941):

The founders of our republics . . . seem never for a moment to have turned their eyes from the danger to liberty from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

80. See generally P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 145-71 (1975) (discussing variety of uses for framers' intent in light of changing factual circumstances and changing moral and political ideas).

81. S. HESS, ORGANIZING THE PRESIDENCY 3 (1976).

82. *Id.* at 11.

83. See A. SCHLESINGER, THE IMPERIAL PRESIDENCY (1974) (describing and assailing expansive conception of Presidency).

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commission to inquire into evils and upon discovery correct them”⁸⁴ might well unbalance the constitutional scheme. Statutes leave many policy issues open, even when the common practice of broad delegation is not followed. It would shift too much power to the President if, with few limitations, he could issue orders to agencies that Congress could countermand only with the majorities necessary both to pass legislation and to override a subsequent presidential veto.⁸⁵

In any event, the broad view of power seems to overestimate the institutional competence of the Presidency. It assumes that the President can realistically hope to serve as the overall coordinator of federal regulatory policy. In the past, Presidents have not succeeded in coordinating policy even within the executive branch, where the power to do so has often been assumed to exist.⁸⁶ Nor is this situation likely to change: not all issues in regulation are sufficiently important or politically controversial to command presidential attention, and a serious attempt to control the vast regulatory bureaucracy, even excluding the independent agencies, would be a staggering task. Moreover, there is ample reason to doubt that the formation of federal policy would be improved by concentrating it in the White House, thereby creating a potentially unmanageable task.⁸⁷ Indeed, pluralism serves a valuable role in government⁸⁸—the problem is one of accommodating it with a similarly real, but not limitless, need for coordination.

Therefore, it seems best to begin with a more limited view of the Presidency, and to assess its implications for presidential oversight of rulemaking. An influential vision of a relatively modest, “problematic” Presidency is that of Richard Neustadt who emphasizes the President’s interaction with a complex set of institutions and groups having substantial power of their own.⁸⁹ Hence his power, especially

84. The phrase is Justice Cardozo’s, concurring in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935). The context was the invalidation of a very broad statutory delegation of power to the President. Because Cardozo rejected broad presidential power even when Congress tried to grant it, he would undoubtedly have disapproved of a President’s attempt to assume it without special authority.

85. Because a presidential directive may force Congress as a whole to respond to the executive initiative, it may act as a beneficial counterweight to factions within Congress. But such presidential power should also be limited.

86. Robinson, *supra* note 20, at 952-54.

87. See Bruff, *Presidential Exemption from Mandatory Retirement of Members of the Independent Regulatory Commissions*, 1976 *DUKE L.J.* 249, 274-76.

88. This is particularly important in matters raising value choices rather than questions of expertise. See pp. 454-55 *supra*.

89. See R. NEUSTADT, *PRESIDENTIAL POWER* (1960). The “imperial” and the “problematic” Presidencies are two models that can be traced as alternating conceptions through the history of the United States. See Manley, *Presidential Power and White House Lobbying*, 93 *POLITICAL SCI. Q.* 255, 255-56 (1978).

in domestic matters, is largely that of initiation, response, and persuasion.

He has, of course, the constitutional power to propose legislation,⁹⁰ and the statutory power to influence policy by reviewing budgetary and legislative requests of the agencies.⁹¹ But would the problematic Presidency encompass the power not just to propose but also to dispose of a policy initiative with an executive order having the force of law unless overridden by Congress? Even a restrained view of presidential power can provide a place for this kind of initiative.⁹² An examination of the separation of powers doctrine reveals room for a limited presidential role in supervising and coordinating regulation that can increase the overall effectiveness of our system of agency oversight without creating an "imperial" President.

D. *The Contours of Presidential Power: Separation of Powers Analysis*

Starting with the steel seizure case,⁹³ modern interpretation of the President's role has been guided by the separation of powers doctrine. As the contrasting opinions in that case reveal, however, the doctrine has sometimes been construed to mean a simplistic and complete separation of governmental functions that precludes one branch from performing tasks that resemble the duties of another branch. Yet the doctrine has also been understood, in terms more faithful to the intent of the Constitution's framers, to reflect a complicated theory of shared but reciprocally limiting powers, distributed among the

90. U.S. CONST. art. II, § 3.

91. See p. 494 *infra*.

92. Although his book is an argument against overblown presidential powers, Joseph Califano concludes with recommendations for new presidential powers to increase the accountability of federal agencies. J. CALIFANO, *A PRESIDENTIAL NATION* 314 (1975). John Gardner, chairman of the citizen political reform group called Common Cause, observed in the wake of Watergate that the Presidency must be strengthened:

We have heard demands for a seemingly simple remedy: weaken the Presidency, strengthen Congress. But ours is a huge and complex society in a swiftly changing world: we can never again have a weak Presidency or Executive Branch. And Congress, in its nature, cannot play the leadership role alone.

Our only recourse is to accept the necessity for a strong Presidency and Executive Branch and at the same time to create powerful instruments for calling them to account. Most of the needed instruments now exist but require strengthening. It is not just a matter of holding government accountable. Government must help us to hold accountable the great power centers of the private sector.

Gardner, *Rebirth of a Nation* (statement issued by Common Cause 1974), reprinted in Cohen, *Reflections on Political Reform*, 67 *CURRENT HIST.* 49, 51 (1974).

93. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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branches of government.⁹⁴ The framers were careful to divide and disperse political power; to accomplish this goal fully, governmental responsibilities had to be shared in order to check abuses that could accompany the exercise of entirely independent power.⁹⁵ Many subsequent observers have noted that the phrase "separation of powers" is misleading,⁹⁶ yet it continues to stand for an enduring set of principles⁹⁷ that are invoked in significant judicial determinations of presidential power.

1. *Two Views on Separation of Power: The Steel Seizure Case*

*Youngstown Sheet and Tube Co. v. Sawyer*⁹⁸ arose during the Korean War when a strike was threatened in the steel industry. Without statutory authority, President Truman issued an executive order directing the Secretary of Commerce to seize and operate the steel mills. In an opinion by Justice Black, the Supreme Court affirmed the issuance of an injunction against the seizure.⁹⁹ The Court emphasized that the President relied on neither express nor implied statutory authority for the order; indeed, Congress had recently considered and rejected proposed seizure authority in its debates on the Taft-Hartley Act.¹⁰⁰ The Court rejected the argument that the President had "inherent power" to avert the threat to national security posed by a steel strike in wartime. The Court found that neither the President's powers as Commander-in-Chief nor the general constitutional grant of executive power was sufficient to justify the domestic seizure.¹⁰¹

In his opinion, Justice Black relied chiefly on a theory of separation of powers that would prohibit the executive from undertaking activity that could be viewed as lawmaking because that function

94. See Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, LAW & CONTEMP. PROB., Summer 1976, at 1-5, 3 n.21 (quoting Madison and others to identify founders' conception of powers shared by separate institutions).

95. *Id.* at 2.

96. *Id.* at 3 & nn.20-21 (citing commentators).

97. Corwin identified three basic principles embedded in the notion of separated powers: "First, that the three functions should be reciprocally limiting; second, that each department should be able to defend its characteristic functions from intrusion by either of the other departments; and third, that none of the departments may abdicate its powers to either of the others." *Id.* at 4 (summarizing E. CORWIN, *supra* note 78, at 9).

98. 343 U.S. 579 (1952).

99. *Id.* at 589.

100. *Id.* at 586. President Truman sent, without success, two messages to Congress inviting ratification of his action. *Id.* at 583.

101. *Id.* at 587-88.

is the province of Congress exclusively.¹⁰² Justice Black concluded that

[t]he President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President. . . . The Constitution does not subject this law-making power of Congress to presidential or military supervision or control.¹⁰³

Justice Black's separation of powers analysis was sufficient to dispose of the case at hand, but it was unduly simplistic. His broad dictum that the President's lawmaking functions are confined to recommendations to Congress and vetoes is refuted by the reality of executive power under most legislation. To the extent that Congress legislates through general policy standards, it necessarily relies on the executive discretion to define the law in greater particularity through its application.¹⁰⁴ Statutes thus require the executive to "make law" by executing it; rulemaking statutes routinely delegate lawmaking power to the executive branch. The Court itself has recognized the power of Congress to delegate broad lawmaking power to the executive.¹⁰⁵ Perhaps Justice Black's analysis failed to take into account the prevalence and legitimacy of executive lawmaking due to the fact that the case arose in the opposite context of a specific congressional denial of presidential power to act.

Justice Jackson's famous concurring opinion in the case acknowledged that in different circumstances, different kinds and amounts of presidential power could be found.¹⁰⁶ Instead of assuming simplis-

102. The Court noted:

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

Id.

103. *Id.* at 588.

104. See, e.g., K. DAVIS, *DISCRETIONARY JUSTICE* 1-26 (1969).

105. See B. SCHWARTZ, *supra* note 51, § 11 ("The law on delegation has moved from the theoretical prohibition against delegation of legislative power . . . to a rule against unrestricted delegations.") Although the delegation doctrine now permits executive lawmaking, it continues to require that executive discretion be confined by formal standards, in order to ensure that it is confined within the policy bounds set by Congress. *Id.* at 34-35. This requirement attempts to preserve congressional supremacy in lawmaking.

106. 343 U.S. at 635-38.

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tic categories of distinct government functions, Justice Jackson's analysis began with the recognition that

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

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

....

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

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.¹⁰⁷

Justice Jackson concluded that the case before him fell in the third category because Congress had explicitly denied the President the power asserted. This approach seems to provide the most logical explanation of the case and the application of the separation of powers doctrine that is most faithful to the intent of the framers. Under this approach, the case would have little precedential value for situations such as rulemaking, in which Congress has not clearly articu-

107. *Id.* (citations omitted).

lated what it considers to be the appropriate presidential role.¹⁰⁸ Rulemaking appears to fall within the "twilight zone" of Justice Jackson's second category, because both the APA and its legislative history are silent regarding the President's supervisory role.¹⁰⁹ Presidential initiatives in this area would therefore have to be reviewed on a case-by-case basis;¹¹⁰ the acts of the President would also be limited to the policy alternatives authorized by Congress.

Given the general parameters of the President's authority set by *Youngstown*, the President may be able to act without specific authority in overseeing the execution of many statutes at once.¹¹¹ Although this argument was rejected in *Youngstown*, its assertion by the dissenters was out of place because Congress had explicitly denied the President authority to seize property. However proper it was for the majority to reject the argument in that context, the case does not foreclose the possibility that presidential power to coordinate statutes without having explicit authority to do so may be legitimate elsewhere—perhaps in a particular rulemaking situation.¹¹²

108. Further, a presidential role in rulemaking presents a situation so different from the one in *Youngstown* that many of the arguments raised in that case have no bearing. For example, the majority and three dissenters debated whether the steel strike actually created an emergency of such dimension that inherent presidential powers to protect the nation could be asserted. *Id.* at 587; *id.* at 668 (Vinson, C.J., dissenting). The dissenters readily amassed a series of cases in which presidential action without prior congressional authorization had been upheld. Most of these involved real or purported emergencies—the most vivid example is President Lincoln's extraordinary series of unauthorized actions at the outset of the Civil War. *See, e.g.,* The Prize Cases, 67 U.S. (2 Black) 635 (1863) (confirming President Lincoln's authority to issue Emancipation Proclamation without statutory authority). The emergency cases are appropriate for discussing inherent presidential powers, but they are relevant to presidential involvement in federal agency rulemaking only in special cases. *See pp.* 495-96 *infra*.

Also providing little insight into the President's role in federal agency policymaking is the discussion in *Youngstown* of cases involving foreign affairs and featuring broad dicta about congressional delegations of presidential power. *See* 343 U.S. at 635 n.2 (Jackson, J., concurring) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), as example of broad presidential authority available in foreign affairs). For a discussion of the President's powers regarding rulemaking involving foreign affairs matters, *see p.* 495 *infra*.

Similarly, little can be learned about the President's role in agency rulemaking from cases involving longstanding presidential practices never clearly authorized by Congress but arguably ratified by its silence. *See, e.g.,* 343 U.S. at 610-11 (Frankfurter, J., concurring) (citing *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915), as example of congressional acquiescence over time to executive practice of withdrawing public lands from private acquisition).

109. *See* H.R. REP. No. 1980, *supra* note 73, at 23-26; S. REP. No. 752, *supra* note 73, at 13-16. *See* G. ROBINSON & E. GELLHORN, *supra* note 42, at 96-99. There were proposals for an Office of Federal Administrative Procedure with a director to be appointed by the President, *Hearings on the Administrative Procedure Act Before the House Comm. on the Judiciary*, 79th Cong., 1st Sess. 7-8 (1945), but they were not enacted. The office was to study administrative procedure and recommend improvements.

110. *See p.* 479 *infra*.

111. 343 U.S. at 701-02 (Vinson, C.J., dissenting); *see p.* 495 *infra* (quoting dissent).

112. *See p.* 489 *infra*.

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Presidential power to influence or direct the procedure or substance of policy formed in rulemaking can be reconciled with *Youngstown* as long as the outcome is within the relevant statutory delegation of rulemaking power. Hence, presidential action may be justifiable if it comports with demonstrable needs to execute the laws and if it does not offend policies found in the statutes governing rulemaking. Such a reading of the case would respect the Court's emphasis on maintaining the separations between the branches and on preserving the ultimate supremacy of Congress in lawmaking, yet it would incorporate the everyday reality of executive discretion to form policy within the often commodious bounds of statutory commands. This view would also allow presidential initiatives in situations in which Congress has not explicitly attempted to limit the President.¹¹³

2. *The Removal Cases*

Judicial analysis of the President's power to control the executive branch and the independent agencies has also relied on the separation of powers doctrine; here the simplistic view of that doctrine has prevailed.¹¹⁴ Thus, the Supreme Court cases involving the President's power to remove members of agencies from office have drawn a rigid line between the executive branch and the independent agencies.¹¹⁵ As a result, the President is accorded nearly complete control over the executive branch but no power over the independent agencies except for the constitutional power of appointment. This provides an inadequate approach to the removal cases themselves and also neglects the meaning of separation of powers that was intended by the framers.

The Supreme Court's first comprehensive exploration of the removal power occurred in 1926, in *Myers v. United States*.¹¹⁶ Frank

113. Despite the plausibility of this view of *Youngstown*, the Court's emphasis that Congress is the primary policymaker in domestic matters suggests that the Court may be unreceptive to broad claims of inherent presidential power even when Congress has not precluded them. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-7 (1978); Kauper, *The Steel Seizure Case: Congress, the President and the Supreme Court*, 51 MICH. L. REV. 141, 174-75 (1952).

114. See pp. 470-71 *supra*.

115. Although the cases bearing most directly on the President's power to control the executive branch and the independent agencies are the removal cases, there are substantial differences between the power to remove an officer and the power to direct his activities. Removal may raise some issues that directives do not; for example, the propriety of patronage removals is unrelated to the disputes over agency policy or governance that may arise from presidential involvement in agency rulemaking.

116. 272 U.S. 52 (1926).

Myers was a postmaster in Portland, Oregon, who had been appointed by the President and confirmed by the Senate under a statute giving him a four-year term, subject to removal by the President with the Senate's advice and consent. For unstated reasons, President Wilson dismissed Myers and did not ask for the Senate's approval. In a suit for Myers's salary, the Court held that the statutory restriction of the President's power of removal was unconstitutional.

First, the Court noted that except for the impeachment clause,¹¹⁷ the Constitution is silent on the subject of removals, and the subject was not discussed in the Constitutional Convention.¹¹⁸ Despite the express constitutional power of the Senate to consent to appointments and despite the power of Congress to define the qualifications for and terms of executive offices,¹¹⁹ the Court announced an implied presidential power of removal not subject to legislative limitation. Chief Justice Taft, himself a former President, deduced from the President's duty to execute the laws a functional necessity for him to direct the actions of executive officers¹²⁰ within the limits set by authorizing statutes.¹²¹ To ensure a unitary and uniform execution of the laws, the President must have the sanction of removal to enforce his supervision of even the most lowly executive official.¹²²

117. U.S. CONST. art. II, § 4, quoted in note 56 *supra*.

118. See 272 U.S. at 110.

119. U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have power to make all laws which shall be necessary and proper to carry into execution . . . all . . . powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof.")

120. The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. . . . As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, . . . that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible.

272 U.S. at 117 (citation omitted).

121. *Id.* at 132. Taft thus anticipated the holding of *Youngstown*.

122. *Id.* at 135. The Chief Justice did add a caveat:

Of course there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi-judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed.

Id.

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To reach its conclusion, the Court adopted a simplistic view of the separation of powers. It argued that the Constitution meant to forbid each branch from exercising a function of the others unless there was an explicit provision blending them, as in the grant of power to the Senate to consent to appointments.¹²³ Because removal of executive officers was an executive function, Congress could not participate in it without express sanction to do so.¹²⁴ Therefore, although Congress had explicit power to vest appointments in the heads of departments, it could not impair the President's power to remove officers.¹²⁵ The difficulty with this approach is its tendency to seize upon one explicit constitutional provision and to imply extensive powers from it, without regard to the limitations implied by other constitutional provisions.¹²⁶

The breadth of the majority's position rendered it vulnerable to persuasive arguments by the dissenters. Justices McReynolds and Brandeis reviewed the framers' cautious view of executive power¹²⁷ and previous congressional restrictions on removal that had received tacit approval from both the Supreme Court and the President.¹²⁸

123. *Id.* at 116-18.

124. The Court's opinion did not carefully distinguish between congressional power to restrict the grounds for removal and power to review a particular removal by requiring the Senate's advice and consent. *E.g., id.* at 127. The dissenters suggested that the former power is a legislative one, perhaps within the congressional power to prescribe qualifications; the latter might stand on different ground. *Id.* at 183 (McReynolds, J., dissenting); *id.* at 245 (Brandeis, J., dissenting). The Court apparently meant to forbid both.

125. *Id.* at 125-27, 163-64.

126. Broad implied powers are associated with the "Imperial Presidency." *See* p. 468 *supra*.

127. As Justice McReynolds put it:

It is beyond the ordinary imagination to picture forty or fifty capable men, presided over by George Washington, vainly discussing, in the heat of a Philadelphia summer, whether express authority to require opinions in writing should be delegated to a President in whom they had already vested the illimitable executive power here claimed.

272 U.S. at 207.

In particular, the dissenters could find support in *The Federalist*:

It has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. *The consent of that body would be necessary to displace as well as to appoint.* A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected, if he were the sole disposer of offices.

THE FEDERALIST No. 77 (A. Hamilton) at 496 (Modern Library ed. 1941), *quoted in* 272 U.S. at 208 (McReynolds, J., dissenting) (emphasis added).

128. The most disputed instance of congressional construction of Article II involved the "decision of 1789," in which the first Congress had recognized presidential power to remove the head of a new Department of Foreign Affairs. 272 U.S. at 111-26. Taft read this as conceding the absence of congressional power to restrict removal; the dissenters correctly rejoined that the decision was also consistent with a congressional view that restricting the President in this instance was unwise but not unconstitutional. *Id.* at 194-

The dissenters also urged against an unrestricted presidential removal power, because the result could be a presidential spoils system intruding on the civil service laws.¹²⁹ Further, the dissenters objected to the pretense that all executive officers are alike and should be subject to the same kind of presidential supervision. An unlimited presidential removal power might be appropriate for cabinet officers in whom the President requires personal confidence.¹³⁰ But for officers performing adjudications, such as judges without life tenure and members of the ICC and Federal Trade Commission (FTC), a plenary presidential removal power seemed clearly inappropriate.¹³¹

In *Humphrey's Executor v. United States*,¹³² the Court reviewed President Franklin Roosevelt's removal of an FTC Commissioner without asserted cause,¹³³ and held that a statute allowing removal only for "inefficiency, neglect of duty, or malfeasance in office"¹³⁴ was constitutional. Indeed, the Court thought that Congress had intended to insulate the FTC almost entirely from presidential in-

98 (McReynolds, J., dissenting); *id.* at 284-85 (Brandeis, J., dissenting). In support of their view, the dissenters cited *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162, 164-65 (1803), which had reached its great constitutional issue only after determining that the statute creating a term of office for the justices of the peace involved protected them from summary presidential removal. 272 U.S. at 215 (McReynolds, J., dissenting); *id.* at 242-43 (Brandeis, J., dissenting). Moreover, Presidents had repeatedly signed legislation including removal restrictions. *Id.* at 209-15 (McReynolds, J., dissenting); *id.* at 250-83 (Brandeis, J., dissenting).

129. The case at bar supported their argument well: postmasters constituted the numerical bulk of all presidential appointees. The statutory provision in question, requiring the Senate's advice and consent to the removal of postmasters, was adopted as a control on the presidential patronage power. 272 U.S. at 275-78 (Brandeis, J., dissenting).

130. The Court itself observed that

[t]he degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their services as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political.

Id. at 132.

131. *Id.* at 181-82 (McReynolds, J., dissenting).

132. 295 U.S. 602 (1935).

133. Commissioner William Humphrey was nominated to the Commission by President Hoover. President Roosevelt requested Humphrey's resignation, "on the ground 'that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection,' but disclaiming any reflection upon the commissioner personally or upon his services." *Id.* at 618. Roosevelt removed Humphrey after the commissioner refused to resign.

134. 15 U.S.C. § 41 (1976) (causes required for removal). Statutory definitions of cause for removal often closely resemble this provision. *E.g.*, 49 U.S.C. § 11 (1970) (ICC: identical); *id.* § 1321(a)(2) (1970) (CAB: identical); *see* 29 U.S.C. § 153(a) (1970) (NLRB: "upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause"); 42 U.S.C.A. § 7171(b) (West Supp. 1977) (Federal Energy Regulatory Commission in Department of Energy: "only for inefficiency, neglect of duty, or malfeasance in office").

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terference, and that it could do so.¹³⁵ In order to distinguish the sharply contrary opinion in *Myers*, which had granted the President unlimited authority to remove executive officers, the Court in *Humphrey's Executor* concluded that the FTC commissioner was not a member of the executive branch.¹³⁶ In an attempt to limit the excesses of *Myers*, the Court's equally sweeping opinion in *Humphrey's Executor* thus eliminated presidential removal power from the "headless 'fourth branch'" of the independent agencies.¹³⁷

The Court assumed that its alternatives were to find a presidential removal power limited only by Article III's explicit tenure protection for members of the judiciary, or to recognize congressional authority to divorce such agencies as the FTC from executive control. Yet these were not the only alternatives; the framers' conception of shared but mutually limiting powers¹³⁸ and Justice Jackson's approach to the accommodation among the branches¹³⁹ point toward a more flexible, case-by-case balancing of the need for presidential action against the need for checks against unlimited executive power.¹⁴⁰ Instead, *Humphrey's Executor* established an unrealistic and

135. The Court thought that the ultimate goal of Congress was to divorce the FTC from politics entirely:

The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

295 U.S. at 624 (quoting *Illinois Cent. Ry. v. ICC*, 206 U.S. 441 (1906)).

Thus, . . . the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority *except in its selection*, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

Id. at 625-26 (emphasis in original).

The long, staggered terms of commissioners and the statutory provision limiting removal to cause suggested this congressional purpose to the Court.

136. Thus, the postmaster in *Myers* was distinguished from the commissioner on the ground that the postmaster was charged only with executive functions and had no duty related to the legislative power. *Id.* at 624-26.

137. The phrase, quoted in K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, *supra* note 68, § 1:7, at 21-22, originated with the President's Committee on Administrative Management that reported to President Franklin D. Roosevelt in 1937.

138. See p. 471 *supra*.

139. See p. 473 *supra*.

140. Despite its holding, the Court in *Myers* suggested a flexible approach by remarking that presidential supervisory power might vary with the function involved. Greater independence might be reserved for officials entrusted with "quasi-judicial" decisions and matters of individual discretion, see note 122 *supra*. Cabinet-level officers could be treated as fully subordinate to the President, see note 130 *supra*.

oversimplified distinction between "purely executive" officers, to whom *Myers* still applied, and others, for whom Congress could limit the presidential removal power.¹⁴¹ This distinction is belied by practice: the executive agencies often perform "quasi-legislative" and "quasi-judicial" functions;¹⁴² independent commissions often perform such executive duties as prosecution.¹⁴³

The Court's doctrinal difficulties probably stemmed from its uncritical acceptance of the premise traditionally underlying the formation of independent agencies—that regulation should be entrusted to nonpartisan experts whose decisions are free from "political" supervision by the President.¹⁴⁴ Yet the independent agencies have never

141. The first unrealistic and oversimplified application of the distinction appeared in *Humphrey's Executor* itself, when the Court inadvertently defined the FTC in terms characteristic of an executive agency—"an administrative body created by Congress to carry into effect legislative policies"—but concluded that the agency "cannot in any proper sense be characterized as an arm or an eye of the executive." 295 U.S. at 628.

Difficulties in applying the Court's distinction are manifested in subsequent cases. See *Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941) (upholding removal of TVA director, although admitting that TVA exercised only "predominantly" executive function); *Lewis v. Carter*, 436 F. Supp. 958 (D.D.C. 1977) (denying preliminary injunction to reinstate member of Equal Employment Opportunity Commission because EEOC quasi-legislative and quasi-judicial functions are insufficient to qualify it as independent agency); *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) (President's removal of Watergate Special Prosecutor Cox held illegal).

Moreover, actual emphasis on certain functions of an office may vary with time: for example, the FTC has recently become active in rulemaking; in earlier times it relied heavily on informal ("executive"?) enforcement practices and adjudication. See generally G. ROBINSON & E. GELLHORN, *supra* note 42, at 411, 529-31.

One simple, predictable definition of the Court's term "purely executive officers" would include only Cabinet-level officers, except that *Humphrey* explicitly endorsed the holding of *Myers*, which concerned postmasters. See 295 U.S. at 624-26.

142. See note 135 *supra* (quoting *Humphrey's Executor*).

For example, the Food and Drug Administration issues many rules, and the Social Security Administration performs vast numbers of adjudications. Both are within the Department of Health, Education, and Welfare.

As Justice Jackson explained, dissenting in *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952), use of the terms "quasi-legislative" and "quasi-judicial" does not aid analysis:

Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

143. The FTC's shared jurisdiction with the Antitrust Division of the Department of Justice in antitrust enforcement is perhaps the best example of this. Both agencies exercise prosecutorial discretion, a classic executive function. See 15 U.S.C. § 21 (1976) (FTC enforcement authorization); *id.* §§ 1312, 1314 (Justice Department enforcement).

144. See note 135 *supra*. For discussion of this theory, see 5 STUDY ON FEDERAL REGULATION, *supra* note 16, at 26-32; Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1056-61 (1975). In general, independent agencies have been created to regulate difficult, technical subjects such as utilities and nuclear power plants. An independent agency has also been selected when regulation takes the form of ad-

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been totally isolated either from the President¹⁴⁵ or from politics.¹⁴⁶ In recent years, it has become evident that the traditional premise is itself unsound to the extent that value judgments underlie even technical regulation.¹⁴⁷ Congress has implicitly recognized this fact in its recent attempts to increase the political accountability of regulation.¹⁴⁸ Thus, whatever its original basis, the device of independent regulation seems to have evolved into a means for adjusting the balance of power over the agencies between Congress and the President.¹⁴⁹ So viewed, it does not merit the broad constitutional protection that the Court gave it.

There is another possible basis for the Court's holding in *Humphrey's Executor*, one less laden with overbroad implications. The case seems to rest in large part upon a procedural value—the necessity of recognizing congressional power to protect officers engaged in adjudication from summary removal without cause.¹⁵⁰ This is a clearly appropriate ground for recognizing congressional power to restrict

judication, as with licensing of broadcast stations. In some instances, these characteristics combine; the presence of either has influenced Congress to remove decisionmaking from executive control.

145. The President commands certain statutory powers over them in addition to his appointments power. See pp. 491-95 *infra*. The very provisions that restrict the President's power to remove members of the independent agencies presuppose some presidential supervisory power, which is as yet undefined.

146. Congressional oversight is certainly political. Moreover, broad statutory delegations of power to agencies transfer much of the political process from the halls of Congress to those of the agencies. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 775-79 (1975).

147. See pp. 454-55 *supra*; Cutler & Johnson, *supra* note 68 at 1405-06; Freedman, *supra* note 144, at 1063; Gellhorn & Robinson, *supra* note 146, at 778-79 & 778 n.22; Noll, *Breaking Out of the Regulatory Dilemma—Alternatives to the Sterile Choice*, 51 IND. L.J. 686, 688 (1976).

148. See pp. 489-90 *infra*.

Nor has Congress been entirely consistent in its delegation practices. Recent statutes have often placed "expert" determinations of the sort traditionally thought suitable for the independent commissions in executive branch agencies such as the EPA. In contrast, the independent agencies perform much rulemaking that is not technical, for example the FTC's consumer protection activities. See 15 U.S.C. § 57a (1976).

149. See Karl, *Executive Reorganization and Presidential Power*, 1977 SUP. CT. REV. 1.

150. If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, . . . agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi-legislative and quasi-judicial bodies, but the judges of the legislative Court of Claims exercising judicial power . . . continue in office only at the pleasure of the President.

295 U.S. at 629.

removals.¹⁵¹ For example, no one would argue that the statutory tenure protections now enjoyed by administrative law judges¹⁵² should be found unconstitutional. Hence the Court may have been avoiding a constitutional issue other than the one explicitly before it.

Some support for this view of *Humphrey* can be drawn from the Court's similar reasoning in another case decided the same day. In *A.L.A. Schechter Poultry Corp. v. United States*,¹⁵³ the Court invalidated the National Industrial Recovery Act as an unconstitutionally broad delegation of legislative power. In distinguishing earlier statutory delegations that had been upheld, the Court emphasized that they provided for fair adjudicative procedures to confine administrative discretion.¹⁵⁴ This due process value underlying *Schechter Poultry* justifies the holding in *Humphrey's Executor* that Congress has some authority to restrict the President's removal power; it does not, however, require broad dicta that regulatory agencies such as the FTC must be completely independent of executive supervision.

The due process value reappeared in *Wiener v. United States*,¹⁵⁵ the Supreme Court's most recent treatment of the removal issue. Congress established the War Claims Commission to "adjudicate according to law" certain claims arising from enemy action in World War II. The commissioners were presidential appointees; there was no provision regarding their removal.¹⁵⁶ President Eisenhower, asserting a need to complete the Commission's task "with personnel of my own selection," removed Commissioner Myron Wiener, who then sued for lost salary. Justice Frankfurter's opinion for a unanimous Court reiterated the simplistic categories of *Humphrey's Executor*¹⁵⁷ and found that Congress intended the Commission to be protected from presidential review because it was an adjudicating body charged with deciding claims on the merits, entirely free of influence from any other branch of government.¹⁵⁸ Wiener's removal was illegal because Congress would not want the commissioners to fear "the Damocles' sword of removal by the President for no reason other than

151. It has not, however, been accorded constitutional status. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 311 (1955) (summary rejection of claim that adjudications performed by officers subject to general supervisory control offend due process).

152. 5 U.S.C. § 7521 (1976); see *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953).

153. 295 U.S. 495 (1935).

154. *Id.* at 538-41.

155. 357 U.S. 349 (1958).

156. The Commission was to complete its task within three years, thus setting a fixed term for the Commissioners. *Id.* at 350.

157. *Id.* at 353.

158. *Id.* at 355-56.

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that he preferred to have . . . men of his own choosing.”¹⁵⁹ This holding is sound because an adjudicating agency does deserve protection from outside interference. The unfortunate feature of the decision was its uncritical repetition of the broad distinction in *Humphrey's Executor* between executive and independent officials.

The Supreme Court's removal cases leave us without sound guidelines for the extent of presidential power to govern rulemaking. The facts of the cases, involving three clumsy removals without asserted cause and with overtones of patronage, did not force the Court to focus on problems of general policy formation and coordination in government or on the need for presidential review of a specific policy issue. Thus, the holdings in *Humphrey's Executor* and *Wiener* do not establish the appropriate grounds for presidential removal of independent commissioners beyond the bare conclusion that the statutes do not permit removal at the pleasure of the President.

If the dicta of the removal cases are taken at face value, the net result of the Court's rigid approach is unrestricted presidential domination over executive officers, and complete protection from his influence for independent officers. Not only does this result deviate from the system of checks and balances envisaged by the framers, it also has been challenged by other more recent cases applying a flexible approach to separation of powers issues, and by recent statutory grants of presidential powers.

3. *The Recent Supreme Court Approach*

Recent Supreme Court decisions taking a flexible approach to separation of powers issues warrant a departure from the simplistic analysis in the removal cases. In *United States v. Nixon*,¹⁶⁰ the Supreme Court was willing to imply a presidential power for functional reasons, but was unwilling to extend that power beyond its justification in a particular case. The Court recognized a limited, constitutionally based privilege of confidentiality for records of conversations between the President and his staff. Although the Constitution mentioned no such privilege, the Court inferred it from the President's functional need to ensure candid communications in the process of executive decisionmaking.¹⁶¹

159. *Id.* at 356.

160. 418 U.S. 683 (1974).

161. *Id.* at 705-06; *see id.* at 711 (“Nowhere in the Constitution, . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.”)

The Court's approach was marked by caution.¹⁶² It was willing to recognize only a qualified executive privilege that did not prevail in the case at hand; the purposes behind a specific subpoena for evidence relevant to a criminal prosecution outweighed the President's "undifferentiated" interest in confidentiality. If the competing interest had been less important or if the President's interest in confidentiality had been focused, for example, on the need to protect particular military secrets, the Court might have decided the case differently.¹⁶³ The balancing approach employed by the Court suggests that constitutional arguments for implied presidential power in the rulemaking context may be successful if they persuasively establish a particular functional necessity that would outweigh competing interests.

In *Buckley v. Valeo*,¹⁶⁴ the Court again adopted a relatively discriminating approach to separation of powers issues in its invalidation under the appointments clause of statutory requirements that some members of the Federal Election Commission be congressional rather than presidential appointees. The Court emphasized that the branches of government were meant to be "largely" but not totally separate from one another.¹⁶⁵

162. Although the opinion and the holding of the case are cautious, in one statement the Court suggested that other implied powers or privileges might "flow from the nature of enumerated powers." *Id.* at 705-06. The Court appended a footnote suggesting a very broad approach that is inconsistent with the rest of the opinion and that appears to equate the determination of implied presidential power with the very different question of congressional power under the "necessary and proper" clause. *Id.* at 705 n.16. For a discussion of the difficulties raised by so broad an approach to presidential power, see Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of "The Sweeping Clause,"* 36 OHIO ST. L.J. 788, 809-17 (1975).

163. It has been suggested that in reaching the merits, *Nixon* may have implicitly overruled the remainder of *Myers*, so that there are no longer any limits on congressional power to restrict presidential removals. Mishkin, *Great Cases and Soft Law: A Comment on United States v. Nixon*, 22 U.C.L.A. L. REV. 76, 82-83 (1974) (observing that court rejected claim that case was nonjusticiable as interbranch dispute between Special Prosecutor and President). The case is more properly understood as a waiver of the President's plenary powers over the executive branch. Justiciability was sustained on the basis of a regulation issued by the Attorney General, reporting presidential assurances that the Special Prosecutor would not be removed except for extraordinary improprieties, and explicitly giving him power to contest claims of executive privilege. *United States v. Nixon*, 418 U.S. 683, 694-97 & 694 n.8 (1974).

164. 424 U.S. 1 (1976).

165. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively. *Id.* at 120-21. The Court cited both the majority opinion in *Youngstown* and Justice Jackson's concurrence, without recognizing the inconsistencies between them. *Id.* at 122-23 (citing 343 U.S. at 635 (Jackson, J., concurring) and *id.* at 587-88 (opinion of Court)).

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From this premise it concluded that any appointee exercising “significant authority” pursuant to federal law was an “Officer of the United States” who must be appointed in compliance with Article II.¹⁶⁶ The Court would not recognize an exception for the independent agencies, even though their duties might be “‘predominantly quasijudicial and quasilegislative’ rather than executive.”¹⁶⁷ It thought the removal cases were consistent with this conclusion, since they had carefully distinguished the President’s appointments power.¹⁶⁸ In applying its general principles to the Federal Election Commission, the Court emphasized that the agency possessed prosecutorial functions, which could be exercised only by “Officers of the United States.” Yet it would create no special exception for rulemaking or adjudication.¹⁶⁹

In refusing to recognize a special preserve for rulemaking or adjudicative functions of agencies, the *Buckley* Court avoided following the logic of *Humphrey’s Executor* to its terminus, which would be complete congressional hegemony over these functions. Instead, the Court accurately described rulemaking and adjudication as functions performed by both executive branch and independent agencies, and did not employ the *Humphrey’s Executor* Court’s unrealistic characterization of rulemaking and adjudication as nonexecutive functions. Like *Nixon*, *Buckley* took account of the complexity of relationships among the branches of government and avoided allowing an undue concentration of power in any one of them.

The Court also rejected a simplistic view of executive power when it distinguished between different kinds of executive officials in *Elrod v. Burns*.¹⁷⁰ In holding that patronage discharges of public employees violate the First Amendment, the Court identified justifications for treating policymaking officials differently from employees with more limited responsibilities.¹⁷¹ Thus, *Elrod* vindicates the position of the dissenters in *Myers* who argued that not all officers and not all reasons for dismissals ought to be treated the same way. Because the *Elrod* Court was willing to permit discharges of policymakers, who are in a position to “thwart the goals of the in-party,”¹⁷² it also might allow presidential directives affecting rulemaking by the same persons.

166. 424 U.S. at 126.

167. *Id.* at 133 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 625 (1935)).

168. 424 U.S. at 135-36. Although the Court distinguished the removal cases summarily, it seemed to intend to leave their holdings undisturbed.

169. *Id.* at 140-41.

170. 427 U.S. 347 (1976).

171. *Id.* at 367-68.

172. *Id.* at 367.

E. *Evaluating Presidential Initiatives According to Separation of Powers Analysis*

A simplistic view of separation of powers leads to easy, but unsatisfactory, answers to questions about the scope of presidential power. It would be simple to tell a President who wants to act without express authority that he cannot do so, but this does not reflect the willingness of the Court to find implied presidential powers in particular circumstances.¹⁷³ Similarly, it would be simple to say that a President must not undertake initiatives that influence the substance of rulemaking delegated to other agencies of government. Restricting the President to procedural initiatives would avoid some of the dangers of special interest influence.¹⁷⁴ It would also avoid overburdening the presidential staff¹⁷⁵ and straining the limits of implied powers.¹⁷⁶ Yet drawing the line between procedural and substantive efforts is not, in fact, easy,¹⁷⁷ and the Court has indicated that the President may be authorized to influence the substance of government policy

173. Justice Jackson wrote that, in the twilight zone where the distribution of power between Congress and the President is uncertain, congressional inertia may enable the President to act and to defend his act on the basis of immediate imperatives. *See* pp. 472-73 *supra*. The majority opinion of the Court in *Youngstown* did not preclude the President from acting without specific authority to oversee the execution of many statutes. *See* p. 474 *supra*. More recently, the Court used functional grounds to imply a limited presidential privilege of confidentiality. *See* pp. 483-85 *supra*. And the courts have often upheld executive orders based on implied statutory authority. *See generally* Fleishman & Aufses, *supra* note 94.

174. A presidential order changing an agency's substantive policy may be suspect as the product of special interest influence; a procedural order setting structures for the future is essentially neutral as to the interest of particular parties. *Cf. Hunter v. Erickson*, 393 U.S. 385, 393 (1969) (Harlan, J., concurring) (distinguishing between facially discriminatory laws defining institutional structures "with the purpose of aiding one particular group" and facially neutral laws defining these structures "with the aim of providing a just framework" for competition among groups).

175. If conducted on a continuing basis, White House formulation of substantive directives would tend to strain the institutional capacity of the Presidency more than designing procedural directives would, because substantive orders would often require particular expertise in technical areas. Agencies, however, can claim some expertise in procedural as well as substantive matters. *See Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc.*, 435 U.S. 519, 524-25, 543-46 (1978). Substantive directives occurring only on an occasional basis, not as part of an ambitious program for coordinating all federal policy, would not overburden the capacity of the Presidency.

176. Statutes granting the President oversight powers with respect to the agencies carry substantially greater implied authority for procedural directives than for substantive ones. Indeed, these statutes impose careful limits on the substantive effects of presidential action. *See* pp. 492-95 *infra*.

177. An expressly procedural requirement, such as Quality of Life Review, can indirectly but effectively influence the substantive direction of agency policymaking. *See* pp. 464-65 *supra*.

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so long as he does not violate the boundaries set by express congressional policy.¹⁷⁸

Finally, it would be simple to announce that the President cannot interfere with the operations of independent agencies except with such explicit authority as the appointments power. This view, however, depends on the false assumption that independent agencies and executive agencies can always be distinguished.¹⁷⁹ Moreover, it neglects perhaps more subtle, but more meaningful reasons for restricting presidential influence. Particular agency functions need immunity to satisfy due process concerns: in adjudicatory proceedings, the parties need assurance that the judgment will pertain to the merits of their case, not to external pressures on the judge.¹⁸⁰ Certain rulemaking activities that distribute scarce resources also require protection against outside influence. Finally, presidential intervention in particular agency functions may have the effect of undermining the capacity of the courts to review—and constitutionally check—agency decisions.¹⁸¹ Functional rather than formal distinctions between kinds of agency conduct are necessary to identify these reasons for restricting presidential influence.

The simplistic view of separation of powers thus is actually difficult to apply. It is more severely flawed because it deviates from the framers' complex understanding of governmental authority that is shared by reciprocally limiting branches. The framers' conception is dynamic and permits change over time, even though the framers themselves could not have anticipated the rise of the regulatory bureaucracy.¹⁸²

A case-by-case approach to the scope of presidential power must occur within two general sets of boundaries—those set by the checks and balances of other branches of government, and those set by the demands of due process. A flexible approach to the President's role in agency rulemaking may yield explicit principles over time: for ex-

178. See p. 475 *supra* (discussing *Youngstown*); p. 476 & note 121 *supra* (discussing *Myers*).

179. See p. 480 & notes 142-43 *supra*.

180. Agency adjudicative functions, such as those of the FTC in *Humphrey's Executor* and the War Claims Commission in *Wiener*, have due process and statutory protection against intervention by the President or any other outside party. See pp. 481-83 *supra*; 5 U.S.C. § 557(d) (1976).

181. Particularly if the presidential intervention is informal, the courts may have difficulty reviewing it. See pp. 504-05 *infra*.

182. The law operates best through flexible categories that can accommodate change. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 4 (1972); see E. BODENHEIMER, JURISPRUDENCE 319 (rev. ed. 1974) (blend of rigidity and elasticity in truly great systems of law); J. FRANK, LAW AND THE MODERN MIND 7 (1963) (uncertainty in law has immense social value for experimentation in response to changing circumstances).

ample, the Court might conclude that presidential intervention in independent agencies should be limited to actions principally affecting procedure rather than the substance of policy.¹⁸³ Primarily, however, the flexible approach must be characterized by estimations of the balance in given circumstances between the President's concerns and the countervailing interests of the other branches and of the people.

III. Authority for Presidential Initiatives: A Functional Analysis

At least six questions should be considered in an evaluation of the legitimacy of a given presidential initiative aimed at influencing agency regulatory policy:

(1) is there express or implied statutory authority for the initiative; (2) does the President have the capacity to execute the initiative; (3) is the initiative best characterized as procedural or substantive; (4) is the regulatory program suited to presidential intervention of the kind attempted; (5) what protections are accorded to ensure that the rulemaking process remains an open one that is fair to those concerned; and (6) are effective checks by the other branches of government available.

Because most rulemaking responsibilities are not directly delegated to the President,¹⁸⁴ analysis must focus on his implied authority. Also, although the distinction between procedure and substance is often elusive, it is useful for analytic purposes to give separate considera-

183. See SENATE COMM. ON THE JUDICIARY, 86TH CONG. 2D SESS. REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960) (Landis Report). The President restricted Executive Order No. 12,044 to avoid Senate objections to potential substantive effects on the independent agencies. See p. 466 & note 77 *supra*.

184. Some statutes do delegate rulemaking authority directly to the President. *E.g.*, Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, *repealed*, Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 817. In promulgating rules pursuant to these statutes, the President is bound by the policy decisions embodied in relevant legislation. See p. 475 *supra* (discussing *Youngstown*). These policy decisions may be reflected in the specific statute delegating rulemaking power to the President, or in the APA's general requirements governing rulemaking. See *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971) (APA applies to President's Office of Science and Technology); *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 759-61 (D.D.C. 1971) (three-judge court) (suggesting, but not holding, that APA applies to President).

A broad argument can be made that whenever Congress delegates power to an official other than the President, it intends that power to be exercised free of presidential supervision. There is a similarly broad rejoinder that Congress is presumably aware that *Myers* supports presidential authority over officers within the executive branch, so that whenever Congress places a rulemaking program there, it contemplates presidential direction. Neither argument is conclusive. Congress does not usually consider the issue of presidential supervision of rulemaking when it passes a statute. This fact accounts for the difficulty of deciding, for example, whether EPA regulations are subject to presidential intervention.

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tion to the President's power to influence procedure and his power to influence the substance of regulatory policymaking.

A. *Implied Statutory Authority for Procedural Directives*

In the absence of demonstrable congressional intent to deny presidential power, it is necessary to ask whether statutory authority for presidential action can appropriately be implied. This requires an inquiry into the policies underlying existing legislation to determine if the presidential action in question is consistent with them. An analysis of recent congressional policies supports an implied presidential power to impose procedural requirements on agency rulemaking; other recent statutes may provide a foundation for an implied presidential power to coordinate rulemaking activities.

1. *Rulemaking Procedures*

Implied authority for President Carter's Executive Order No. 12,044, which imposed expanded procedural requirements on the rulemaking activities of federal executive agencies,¹⁸⁵ cannot be found in the general statute governing agency rulemaking. The APA is silent on the issue of presidential supervision of rulemaking; moreover, it does not impose the degree of procedural requirements ordered by the President.¹⁸⁶ Yet authority for the President's order can be implied from recent congressional enactments that have accompanied new delegations of rulemaking power with special procedures supplementing those in the APA.¹⁸⁷ Although the new requirements have varied from statute to statute, there are some common characteristics that reveal the nature of congressional dissatisfaction with traditional "notice-and-comment" rulemaking. First, Congress has required that an agency publish advance notice of rulemaking before a proposed rule is formulated and published.¹⁸⁸ This gives the public an opportunity to participate in the critical early stages of the drafting process. Second, Congress has required notices of proposed rules to be accompanied by statements of basis and purpose, including underlying factual data and methodology, legal interpretations, and policy considerations.¹⁸⁹ Third, Congress has set a minimum duration for

185. See p. 463 *supra*.

186. See pp. 465-66 *supra*.

187. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, *supra* note 68, § 6.01-4.

188. *E.g.*, Consumer Product Safety Act of 1972, § 7(b), 15 U.S.C. § 2056(b) (1976).

189. *E.g.*, Department of Energy Organization Act of 1977, § 501, 42 U.S.C.A. § 7191 (a)(2) (West Supp. 1977); Clean Air Act Amendments of 1977, § 305(a), 42 U.S.C.A. § 7607 (d)(3) (West Supp. 1977).

the public comment period¹⁹⁰ and has prescribed new procedures for it, including the maintenance of a public docket of relevant materials and comments and the holding of oral hearings.¹⁹¹ These hearings may feature some characteristics of adjudication, such as limited rights to cross-examine or to rebut other participants. Fourth, Congress has required more elaborate statements of basis for final rules, including findings of disputed facts and responses to significant comments.¹⁹² Fifth, Congress has subjected rules to more stringent judicial review¹⁹³ and has defined a rulemaking record for that review. The record consists essentially of the agency's basis statements and supporting documents and the materials produced by its public proceedings.¹⁹⁴ Finally, Congress has subjected a number of rulemaking programs to congressional review for a possible legislative veto.¹⁹⁵

With these new definitions of the procedural requisites of rulemaking, Congress has revealed two broad purposes, which respond to the calls for regulatory reform. Provisions designed to strengthen public participation in rulemaking seek to increase the political accountability of the agencies. Other techniques for achieving greater political accountability, such as the legislative veto, emphasize congressional oversight.¹⁹⁶ By requiring explanations for agency rules and a record that facilitates judicial review, Congress is trying to improve agency accountability and also to ensure that rules are rational and legally justifiable.

The purposes and techniques of these procedural innovations by Congress establish a foundation for implied presidential authority to promulgate Executive Order No. 12,044. The Order advances the policies of political accountability and rationality that underlie the new statutory procedures; all of its requirements can find a statutory analogue.¹⁹⁷

190. *E.g.*, Education Amendments of 1974, § 509, 20 U.S.C. § 1232(b) (1976).

191. *E.g.*, Federal Trade Commission Improvement Act of 1975, § 202(a), 15 U.S.C. § 57a (1976); Department of Energy Organization Act of 1977, § 501, 42 U.S.C.A. § 7191(c) (West Supp. 1977); Clean Air Act Amendments of 1977, § 305(a), 42 U.S.C.A. § 7607(d)(5) (West Supp. 1977).

192. *E.g.*, Consumer Product Safety Act of 1972, § 9, 15 U.S.C. § 2058(c) (1976); Department of Energy Organization Act of 1977, § 501, 42 U.S.C.A. § 7191(d) (West Supp. 1977); Clean Air Act Amendments of 1977, § 305(a), 42 U.S.C.A. § 7607(d)(6) (West Supp. 1977).

193. *E.g.*, Federal Trade Commission Improvement Act of 1975, § 202(a), 15 U.S.C. § 57a (1976).

194. *E.g.*, Clean Air Act Amendments of 1977, § 305(a), 42 U.S.C.A. § 7607(d)(7) (West Supp. 1977).

195. *See* Bruff & Gellhorn, *supra* note 17, at 1371.

196. *See generally* 2 STUDY ON FEDERAL REGULATION, *supra* note 16.

197. Regulatory analyses required by the Order resemble environmental impact statements, *see* 42 U.S.C. § 4332 (1970), and its requirements that agencies review existing rules resemble those in 20 U.S.C. § 1232 (1976) (publication and opportunity for comment requirements for education programs).

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In addition, special characteristics of the President's office support his assertion of a role in advancing the accountability and coordination of rulemaking. The President and his staff seem as competent as Congress to design and implement procedural requirements. Moreover, executive orders have a flexibility not shared by legislation—if the orders prove ill-advised, they can be rescinded at the stroke of a pen. Still, Congress has not yet decided to apply its new procedures generically by amending the APA, and requirements such as those in the Order will impose substantial new burdens on affected agencies. In the absence of an indication that congressional inaction is itself a considered policy judgment, however, the President should be found to have the implied authority to take the initiative, at least for the executive branch.¹⁹⁸

There is even a colorable argument that the new rulemaking statutes carry implied authority for the President to apply the Order to the independent agencies. Congress has applied its new procedures to executive branch and independent agencies alike. The new procedures emphasize public participation in rulemaking and thereby dilute the theory of agency expertise that has accounted for the creation of the independent agencies. In statutes specifically concerning the President's relations with independent agencies, however, Congress has reaffirmed its traditional stance that these agencies should be protected from presidential direction except as specifically authorized.¹⁹⁹

2. *The President's Statutory Powers*

The President has explicit authority to impound program funds under certain circumstances, to reorganize the agencies within statutory limits, to review budget requests of most agencies, and to appoint chairmen of major independent agencies. The statutes assigning these powers carefully limit them to chiefly procedural matters, but they may support some presidential initiatives to affect policy-making.

198. There is support for such an approach in a recent Supreme Court case upholding an Executive Order governing labor-management relations of federal employees. *See Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 273-74 & n.5 (1974). The Court noted the similarity of the Order to national labor legislation and found authority for it in 5 U.S.C. § 7301 (1976), authorizing the President to "prescribe regulations for the conduct of employees in the executive branch."

199. *See pp. 493-94 infra*. Other statutory guarantees of agency independence include recent provisions for some agencies to conduct their own litigation, thereby removing preexisting control by the Department of Justice. *See 5 STUDY ON FEDERAL REGULATION, supra* note 16, at xii, 25-26, 35 n.52, 42-43, 54-62.

a. *Impoundment*

The controversy that arose over President Nixon's power to impound funds appropriated for government programs resulted in the Congressional Budget and Impoundment Control Act of 1974.²⁰⁰ In light of his earlier assertions of nearly limitless impoundment power,²⁰¹ President Nixon's signing of the bill during the last weeks of his Presidency seemed to be a gesture of surrender.

Yet the Act did not entirely eliminate presidential power to influence the flow of funds. For any complete rescission of appropriations by the President, the statute requires the affirmative approval of both houses of Congress, which is equivalent to rescission by statute.²⁰² Thus, the rescission authority does not confer substantial power on the President, but it does give him the opportunity to take the initiative.

In its deferral provisions, the Act accords the President greater although still limited power to interrupt the funding of a given program for reasons such as fiscal policy.²⁰³ Subject to a one-house legislative veto,²⁰⁴ the President is authorized to affect levels of program implementation and enforcement by deferring the expenditure of appropriated funds for the remainder of the current fiscal year.²⁰⁵

b. *Reorganization*

At any particular time, the status of the longstanding contest between Congress and the President over custody of the agencies can be judged by congressional willingness to grant the President reorganization authority.²⁰⁶ Congress has recently shown signs of willingness to grant the President some managerial authority in its renewal of his authority to prepare government reorganization plans. The plans, which take effect if not vetoed by either house of Congress within a stated period,²⁰⁷ may, within specified limits, transfer, consolidate, or abolish agency functions.

A principal limit is the statute's prohibition against the abolition

200. 31 U.S.C. §§ 1301-1407 (Supp. V 1975).

201. See Van Alstyne, *supra* note 162, at 789.

202. 31 U.S.C. § 1402(b) (Supp. V 1975) (President's proposed budget rescission or reservation is effective only with endorsement of both houses within 45 days of its announcement).

203. The President must inform Congress of the reasons for proposing a deferral, "including any legal authority invoked by him to justify the proposed deferral." *Id.* § 1403(a).

204. *Id.* § 1403(b) (either house may pass resolution disapproving proposed deferral).

205. *Id.* § 1403(a) (President is authorized to propose budget deferral but it is limited to end of same fiscal year).

206. See generally Karl, *supra* note 149.

207. Reorganization Act of 1977, 5 U.S.C.A. §§ 901-912 (West 1977).

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of any "enforcement function or statutory program."²⁰⁸ This exception was apparently intended to prevent reorganization plans from having excessive "substantive" effects.²⁰⁹ The President may not abolish or transfer all of the functions of an executive department or independent regulatory agency; nor may he consolidate any two such agencies.²¹⁰ Thus, established policy may not be abandoned, the independent agencies may not be eliminated, and reorganization plans may not be implemented without passing the gauntlet of the legislative veto.

Aside from these exceptions, the Act recognizes presidential power to transfer or to abolish some rulemaking activities,²¹¹ and to achieve limited reorganization of both executive and independent agencies. Although the President's power is carefully restricted, the Act does allow actions that have indirect substantive effects on policymaking.²¹²

208. *Id.* § 903(a)(2).

209. Professor Tribe warned the House committee reviewing the bill that a reorganization power that included authority to abolish programs "could dramatically affect 'the substantive rights and interests of the governed'"; therefore, he argued, the reorganization power should not encompass authority to "abolish, separate, or consolidate functions in such a way as to create a significant risk that any existing act of Congress would be rendered substantively less effective or more difficult to enforce." H.R. REP. NO. 105, 95th Cong., 1st Sess. 15-16, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 54-56.

The House Report explained that the statutory grant of reorganization power must not authorize the President to interfere with agency enforcement functions such as civil rights protection and law enforcement; nor may the power threaten programs such as environmental protection, social security, and school lunches, because these programs were created by Congress and should be abolished only by Congress. *Id.* at 6-7, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 41, 46.

Congress may also have been responding to a constitutional concern. The Attorney General expressed the opinion that the legislative veto would be constitutional only in the context of the reorganization statute because the President's powers under that statute would affect legislative programs only indirectly through internal reorganization of the executive branch. *Id.* at 10-11, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 50-51.

210. 5 U.S.C.A. § 905(a)(1) (West 1977). Professor Tribe suggested that the risks of substantive effects could be reduced if Congress specified that "no reorganization plan submitted under the statute's authority may transfer a function from an independent agency or commission to an agency or branch of an executive department." H.R. REP. NO. 105, 95th Cong., 1st Sess. 17, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 56. Congress partially accepted this suggestion. *See* 5 U.S.C.A. § 905(a)(1) (West 1977). As the committee observed:

The bill recognizes the unique status of the independent regulatory agencies and their special relationship to the Congress by providing that the whole of independent regulatory agencies or all of their functions may not be abolished or transferred nor may two or more such agencies or all their functions be consolidated. This does not mean that such agencies are totally exempt from reorganization authority, but such authority is limited as described heretofore.

H.R. REP. NO. 105, 95th Cong., 1st Sess. 8, *reprinted in* [1977] U.S. CODE CONG. & AD. NEWS 47.

211. *See* 5 U.S.C.A. § 903(a)(2) (West 1977).

212. For example, the President can transfer rulemaking programs from one agency to another having a different policy orientation. *See id.*

Indeed, the Act affirms congressional support of more efficient management of executive functions.²¹³ In this general sense, it recognizes policy coordination as a legitimate presidential activity.

c. *Office of Management and Budget*

Since its inception, OMB, part of the Executive Office of the President, has possessed the power to control the budgetary and legislative requests of federal agencies to Congress.²¹⁴ Most of the independent regulatory agencies have been subject to OMB review.²¹⁵ This congressional delegation of budgetary powers to the President stands as a tacit admission of Congress's difficulties in setting budgetary priorities. Like impoundment, however, this review is mainly a negative restraint on policymaking, and Congress remains free to depart from administration requests by entertaining any proposal it chooses. Still, through OMB, the President has a significant impact on policymaking. He is also authorized to order detailed OMB studies of agency efficiency in order to support appropriate recommendations to Congress.²¹⁶

d. *Chairmanships*

The President selects the chairmen of the major independent regulatory agencies from among their members.²¹⁷ Particularly under recent reorganization plans, the chairmen, in turn, have important powers over agency policy, personnel, and spending.²¹⁸ This appointments power therefore gives the President some indirect control over the course of agency policy. Congress has, however, recently limited the President's power to select some agency chairmen.²¹⁹

Considered together, the foregoing statutes authorize the President to affect rulemaking by transferring programs among agencies, by abolishing some rulemaking functions, by deferring spending, by withholding the administration's support from agency budget and

213. *Id.* § 901(a) (statement of purpose).

214. See W. CARY, *POLITICS AND THE REGULATORY AGENCIES* 6-8, 11-12 (1967); Dixon, *The Independent Commissions and Political Responsibility*, 27 *AD. L. REV.* 1, 6-8 (1975).

215. Congress has recently excepted some independent agencies from OMB review. *E.g.*, 15 U.S.C. § 2076(k) (1976) (Consumer Product Safety Commission); 31 U.S.C.A. § 11(j) (West Supp. 1977) (ICC).

216. 31 U.S.C. § 18 (1970).

217. Dixon, *supra* note 214, at 8 & n.30.

218. Zamir, *Administrative Control of Administrative Action*, 57 *CALIF. L. REV.* 896, 898-99 & n.161 (1969).

219. Act of Nov. 16, 1977, § 204(a), Pub. L. No. 95-188, 91 Stat. 1388 (requiring Senate's advice and consent to appointment of Federal Reserve Board chairman); 15 U.S.C. § 2053 (1976) (setting fixed term to tenure of Consumer Product Safety Commission chairman).

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legislative requests, and by selecting agency chairmen. These powers allow the President to exert indirect but significant influence on agency policymaking. More importantly, they acknowledge the President's role as the official who looks at government as a whole and seeks to achieve coordination, efficiency, and a coherent set of priorities. These statutory policies, together with those underlying the new statutory rulemaking procedures, provide ample justification for presidential imposition of procedural directives such as Executive Order No. 12,044 on executive branch agencies.²²⁰

B. *Substantive Directives*

A number of considerations need to be balanced before the legitimacy of a substantive presidential directive can be established. The policies behind the particular agency program must be weighed against the President's justifications for affecting it. Presidential justifications can include the factual foundation for the initiative and also the relation between the issue at hand and the President's role in the constitutional scheme. The President's justifications must, however, also be evaluated in light of the availability of checks by the other branches of government and the opportunity for public notice of the basis for the presidential action. The general guidelines suggested here outline the kind of reasoning that can be applied to these balancing considerations. They are based on the willingness of federal courts to imply authority for presidential action and on the functional concerns that contribute to judicial analysis.

The President should have his broadest authority over rulemaking in the military and foreign affairs areas. Here his constitutional power is greatest, and broad statutory delegations of power reflect congressional recognition that wide-ranging executive discretion is appropriate. Indeed, because military or foreign affairs functions are excepted from the APA's notice-and-comment rulemaking requirements,²²¹ procedure as well as substance should usually be within executive branch control.

Emergencies should also justify relatively drastic presidential action. Thus, the fuel crisis of 1973 might have supported presidential orders to various agencies to change rules in order to aid conservation. For example, the President might have ordered the EPA to delay some of its rules that protect public health at the cost of greater fuel usage.

220. Thus, the President might offer the techniques for coordinating policy found in the Order as a less drastic alternative to consolidating some rulemaking programs.

221. 5 U.S.C. § 553(a)(1) (1976).

He might have voided or suspended the ICC's rules that force some trucks to return empty from trips delivering goods. Both kinds of initiative would have been subject to judicial review; the limits set by *Youngstown* require that the President act within the parameters set by the governing statutes. Intervention with the ICC would raise the additional question of whether the President could intrude into the affairs of an independent agency; presumably, the Commission's independent status would be given some weight in the judicial balance of competing considerations, but that status would not necessarily be determinative of the outcome.

Economic emergencies would also provide a plausible justification for broad presidential intervention. In the past, Presidents have been delegated broad powers to seek economic stabilization, and the courts have upheld the equally broad executive orders implementing those statutes.²²² This historical delegation of broad economic stabilization powers may be combined with other justifications for presidential involvement in economic regulation even in times not heavy with crisis.

Some economic regulation, such as the discount rate set by the Federal Reserve Board (FRB),²²³ has critical importance for the entire economy and affects many decisions within the executive branch. Although this FRB activity is protected by statute from presidential interference, a particular instance of economic decline may approach crisis proportions and call for a presidential initiative. In addition to citing existing circumstances and the history of broad congressional delegations of economic powers, the President could draw some support for intervention from congressional approval of his role in coordinating federal fiscal policy through budgetary and impoundment powers.²²⁴ The countervailing argument that the FRB was intended by Congress to be immune from any outside intervention thus might be overcome in an exceptional case.

Aside from these situations of potential national emergency, the President should be able to assert extensive implied authority to protect individual rights. Presidents have often used executive orders to advance civil rights—for example, by requiring government con-

222. See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (three-judge court); *Fleishman & Aufses*, *supra* note 94, at 25-31.

223. See 12 U.S.C. § 357 (1976).

224. See pp. 492, 494 *supra*; Memorandum for S. LAZARUS, Associate Director, Domestic Council, Re: President's Authority to impose procedural reforms on the Independent Regulatory Agencies, from J. Harmon, Assistant Attorney General, Office of Legal Counsel (July 22, 1977). Congress has already authorized presidential orders directing the FRB to control the availability of credit during inflationary periods. 12 U.S.C. § 1904(a) (1976).

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tracts to contain provisions forbidding employment discrimination by contractors—and courts have been generous in implying statutory authority for them.²²⁵

In contrast, presidential action that threatens individual constitutional rights should be confined or entirely forbidden. Thus, in *Cole v. Young*²²⁶ the Supreme Court held that an Executive Order providing for summary “national security” dismissals of public employees throughout the government was not authorized by a statute providing for such dismissals from sensitive positions in certain agencies such as the State Department. In the absence of demonstrated necessity, the Court was unwilling to find statutory authority to dilute procedural safeguards surrounding dismissals.²²⁷

There are other rulemaking activities, such as many of the Federal Communications Commission’s (FCC) rules, that affect sensitive constitutional issues in ways that seem inconsistent with presidential supervision. Maintaining the delicate balance between First Amendment rights of broadcasters, of those desiring access to the airwaves, and of the public does not seem to be an enterprise suited to presidential supervision.²²⁸ Presidential intervention in FCC rulemaking would be particularly inappropriate when the President himself is an interested party.²²⁹

In this vein, when an independent agency—or an executive agency—employs rulemaking that is functionally similar to adjudication, presidential supervision is difficult to justify. Individual constitutional rights to due process²³⁰ could be offended by presidential intervention into rulemaking that allocates a valuable benefit among a few interested parties.²³¹ The significant fact here is not that the agency

225. See *United States v. New Orleans Pub. Serv., Inc.*, 553 F.2d 459 (5th Cir. 1977), *vacated and remanded*, 98 S. Ct. 2841 (1978); *Fleishman & Ausfes*, *supra* note 94, at 19-25.

226. 351 U.S. 536 (1956).

227. *Id.* at 546-47. Although the President’s constitutional powers were not asserted in *Cole*, the case suggests that his powers over foreign affairs and over executive branch officers must be reconciled with due process rights of public employees. *Id.* at 557 n.20.

228. See generally *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94 (1973). FCC controversies not implicating free speech, however, should not receive special treatment. *Robinson*, *supra* note 28, at 209-10.

229. See 47 U.S.C. § 315 (1970 & Supp. V 1975) (“equal time” provision). The President could be interested personally or as head of his political party. Just as adjudicators are forbidden on due process grounds to have a personal interest in the outcome of their decisions, self-interested presidential intervention would appear to violate constitutional protections. See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973). Rulemaking by the Federal Election Commission would present similar problems.

230. See pp. 481-83 *supra* (discussing due process element in removal cases).

231. See *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964) (assignment of television channels, though conducted through rulemaking, merits fundamental due process protection against ex parte contacts).

may be called "independent" but that its conduct is sufficiently "quasi-judicial" to warrant due process protections.²³²

C. *Authority to Influence Independent Agencies*

Implicit in this functional analysis is the view that the traditional distinction between the executive branch and the independent agencies should not conclusively determine the availability of presidential supervision. Because this view challenges the Court's constitutional interpretations, it deserves explicit discussion.

First, the traditional distinction would permit unrestrained presidential influence over regulatory policymaking by agencies located in the executive branch. The functional approach, in contrast, identifies tasks such as adjudication that should be protected from outside interference, whether they are performed by an executive branch or an independent agency. This approach draws support from dicta in *Myers* to the effect that presidential supervision of officers should vary with the function involved, and that adjudication is among the matters that may appropriately be committed to the sole discretion of an agency.²³³ Therefore there seems to be no bar to the view that the President's constitutional powers over the executive branch are not plenary, and instead should follow the functional analysis suggested above.

The independent agencies present more difficult constitutional issues. Before reaching them, a court must conclude that the statutes forbid the presidential action at issue. On statutory grounds, independent agencies have been granted protection from presidential involvement in order to ensure two goals: insulation of adjudication from outside influence and development of expertise and stability. The first purpose may be achieved by excepting agency adjudication from presidential supervision. The second is more difficult to accommodate with even a limited presidential role. Although Congress no longer treats the independent agencies as remote bodies of experts entitled to com-

232. In *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), the Supreme Court suggested that although due process strictures do not apply to most rulemaking, there may be exceptions:

In prior opinions we have intimated that even in a rulemaking proceeding when an agency is making a "quasi-judicial" determination by which a very small number of persons are "exceptionally affected, in each case upon individual grounds," in some circumstances additional procedures may be required in order to afford the aggrieved individuals due process.

Id. at 542 (citations omitted).

233. 272 U.S. at 135.

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plete insulation, it has continued to reiterate explicitly its intent to forbid presidential supervision of these agencies.²³⁴ Thus, it would unduly strain statutory interpretation to justify the application of presidential directives to independent agencies on that basis.

Constitutional analysis of the problem is also problematic because the dicta of *Humphrey's Executor* extend complete protection to independent agencies. In accordance with the functional approach to presidential power that the Court has adopted more recently,²³⁵ the Court should limit *Humphrey's Executor* to its holding at the next opportunity. Giving some deference to congressional intent to insulate an independent agency,²³⁶ the Court should articulate presidential powers that are "not fixed but fluctuate,"²³⁷ depending on the justification for their exercise in a given situation. The Court should seek to determine whether a particular rulemaking program has been placed in an independent agency because its nature renders presidential intervention inappropriate, or whether the placement reflects only a tradition of placing similar programs in that particular agency. For example, many of the FRB's functions reside in an independent agency because public confidence in the integrity of FRB actions is paramount. Presidential intervention in any but extraordinary cases might badly damage the agency's capacity to perform. In contrast, many functions entrusted to the ICC or FTC could as well be performed by an executive branch agency.

It is easier to justify the imposition of procedural rather than substantive presidential directives on independent agencies.²³⁸ Executive Order No. 12,044 serves special presidential interests in accountability and coordination, and accordingly could be subsumed under his power to "take Care that the Laws be faithfully executed."²³⁹ The Order would have some substantive effects on independent agency policy-making, but its major thrust is procedural. It is therefore not a severe intrusion on the discretion of these agencies and should be upheld if applied to them.

234. See p. 481 *supra*.

235. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974).

236. The Court should act with some deference to this congressional view of the inappropriateness of presidential supervision of a program, as it traditionally does for legislative judgments. But deference here should be relatively slight, since this particular kind of judgment is the resolution of a separation of powers issue regarding which Congress has long sought to protect its own power at the expense of the President. See generally *Karl*, *supra* note 149.

237. The phrase is Justice Jackson's. See p. 473 *supra*.

238. See pp. 466-67 *supra*.

239. U.S. CONST. art. II, § 3.

D. *Procedural Constraints on Presidential Involvement*

By virtue of his position, the President who chooses to become involved in the substance or procedure of rulemaking by the federal agencies is certain to have significant influence. The temptation to resort to informal contacts between White House staff and agency personnel will be great; such contacts may be secret, unreviewable, and harmful to the rights of interested persons to fair treatment. In a series of recent decisions, the federal courts have extended fairness protections traditionally characteristic of adjudication²⁴⁰ to rulemaking²⁴¹ and other informal executive actions²⁴² to guard against inappropriate influences in agency policymaking.²⁴³ Although the

240. See, e.g., *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966). In *Pillsbury*, the court forbade congressional intrusion in an agency adjudication. Congressmen had urged commissioners and agency counsel during open hearings to adopt a particular interpretation of antitrust law. Because the hearings focused on a case pending before the agency, the court found that Congress impaired the impartiality of the commissioners, and emphasized that Congress was "no longer intervening in the agency's legislative function, but rather, in its judicial function." *Id.* at 964 (emphasis in original). But see *FTC v. Cement Inst.*, 333 U.S. 683 (1948) (commissioners remain qualified to decide case despite expressions of general policy preconceptions so long as their minds remain open).

241. In *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), *cert. denied*, 376 U.S. 915 (1964), the court found that ex parte contacts must be prohibited when the interests involved in rulemaking resemble those typically involved in adjudication. Secret ex parte contacts and minor favors by a party interested in obtaining an opportunity to seek a VHF television channel through an FCC rulemaking proceeding allocating channels among cities were held to be impermissible; the court concluded that "whatever the proceeding may be called . . . basic fairness requires [that it] be carried on in the open" if it involves the "resolution of conflicting private claims to a valuable privilege." *Id.* at 224. The basis for the decision is unclear in that the court suggested not only constitutional and statutory grounds, but also that the ex parte contacts violated the agency's own rules. *Id.* at 224-25.

242. In *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972), the reviewing court invalidated the decision of the Secretary of Transportation to approve construction of Three Sisters Bridge across the Potomac River. The court held that a congressman's threats to delay appropriations for Washington's subway system until the Secretary approved the bridge construction had intruded a factor not authorized by statute into the Secretary's decision. *Id.* at 1245-46. The court remarked that if the Secretary's action had been "purely legislative," it might have been valid despite the presence of "extraneous pressures," *id.* at 1247. For this proposition, it cited cases refusing to consider the motives of elected legislatures. These were not directly in point, however, because appointed bureaucrats exercising delegated powers are confined to the grounds for decision authorized by statute. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) ("the court must consider whether the decision was based on a consideration of the relevant factors").

243. In *United States Lines, Inc. v. Federal Maritime Comm'n.*, Nos. 76-2004 & 77-1470 (D.C. Cir. 1978), the court noted that the "quasi-adjudicatory" procedure in question had to be protected against ex parte communications because the impact of the agency action would extend "well beyond the immediate parties involved." The court noted that "however we label the proceedings involved here and in our earlier cases, the common theme remains: that ex parte communications and agency secrecy as to their substance and existence serve effectively to deprive the public of the right to participate meaningfully in the decisionmaking process." *Id.* slip op. at 38-39 (citation omitted).

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Supreme Court has set limits on judicial creativity in this area,²⁴⁴ and Congress has refrained from imposing on rulemaking the exact procedural protections accorded to agency adjudication,²⁴⁵ the demands of essential fairness in agency conduct suggest that ex parte contacts by anyone, including the President, must be controlled in some fashion. This conclusion, along with the tension created by limitations on the judicial role in this area, is portrayed by two recent decisions by the District of Columbia Circuit.

First, in *Home Box Office, Inc. v. FCC*,²⁴⁶ the court invalidated the FCC's rules for pay television, in part because of repeated ex parte communications between commissioners and both private interests and congressmen.²⁴⁷ The FCC admitted that although it had attempted to make fair allocations of time for public oral argument on its proposed rules, it had often allowed argument to continue ex parte, with compromise positions and the "real facts" reserved for the private sessions.²⁴⁸ The court advanced several reasons for disapproving this practice.²⁴⁹ First, if the positions taken by interested persons in private discussions differed from their public stance, statutorily mandated public procedures would be reduced to "a sham." Second, a court could not effectively review an agency's decision for arbitrariness or inconsistency with statutory authority when the record omitted "relevant information that has been presented" to the agency. Third, the inability of opposing parties to respond to secret presentations would deprive the agency of the benefits of the "adversarial discussion" contemplated by notice-and-comment procedures. Finally, the court con-

244. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); see pp. 459-61 *supra*.

245. Congress's codification in 5 U.S.C.A. § 557(d) (West Supp. 1977) of *Pillsbury's* ban on ex parte influence in adjudication explicitly refrained from extending statutory protection to pure rulemaking. Early versions of this statute proscribed ex parte contracts in informal rulemaking; the provision was deleted. See S. 260, 93d Cong., 1st Sess. § 202, 119 CONG. REC. 647-51 (1973); H.R. 1000, 93d Cong., 1st Sess. § 5(a), 119 CONG. REC. 28, 169-70 (1973); *Hearings on Government in the Sunshine Before the Subcomm. on Reorganization, Research, and International Organizations of the Senate Comm. on Government Operations*, 93d Cong., 2d Sess. 189-254 (1974); SENATE COMM. ON GOV'T OPERATIONS, 93D CONG., 1ST SESS., *GOVERNMENT IN THE SUNSHINE: RESPONSES TO SUBCOMMITTEE QUESTIONNAIRE* (Comm. Print 1973). It is becoming evident, however, that a strict theoretical dichotomy between rulemaking and adjudication is unsound. See Nathanson, *supra* note 46, at 724-27; Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267, 1309-10 (1975).

246. 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

247. There had been a series of meetings between commissioners and private interests, from which public interest intervenors had been conspicuously absent. See *id.* at 51-53. In addition, broadcasters had approached "key members of Congress," who had pressured the FCC to maintain its restrictions on pay television's access to movies. *Id.* at 52 nn.109 & 112.

248. *Id.* at 53 n.117.

249. *Id.* at 53-56.

cluded that secret ex parte communications in rulemaking conflict with "fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."²⁵⁰

As a prospective remedy, the *Home Box Office* court issued a broad directive governing the agency's rulemaking. The court ordered agency members involved in the decisional process of a rulemaking proceeding to refuse to permit ex parte contacts; the court announced that if such contacts do occur, they should be recorded and made part of the public file established for each rulemaking docket.²⁵¹

In *Action for Children's Television v. FCC*,²⁵² (*ACT*) another panel of the same circuit court refused to apply the *Home Box Office* rule retroactively to an FCC decision to suspend a rulemaking proceeding that had been reached in a private meeting between agency and broadcast representatives. Despite the ex parte contacts, the court in *ACT* refused to invalidate the FCC's decision to allow issues concerning the content of children's television to be temporarily resolved by industry self-regulation. Yet the common ground between *ACT* and *Home Box Office* is as important as their differences. The court emphasized its confidence that the actual basis of the agency's decision

250. *Id.* at 56. The court thus flirted with a constitutional ground for its decision. It may have stopped short because of the Supreme Court's suggestion in *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 256 (1973), that due process is inapplicable to rulemaking. *Vermont Yankee* has since reiterated the point. 435 U.S. at 543.

251. See 567 F.2d at 57 (citation omitted):

Once a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision * * *," Executive Order 11920, § 4 If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon. Compare Executive Order 11920, § 5

Drawing on Executive Order No. 11,920, the court applied it beyond its terms, which bar ex parte presentations to White House staff during the time that international air route certifications are before the President for his approval. See 41 Fed. Reg. 23,665 (1976). Because the Executive Order is tailored to a decision that resembles an adjudication in that a few parties are competing for a valuable license, and in that it is conducted as an adjudication at the agency level, the *Home Box Office* court extended the Order beyond its origin in applying it to all rulemaking. See generally Note, *Section 801 of the Federal Aviation Act—The President and the Award of International Air Routes to Domestic Carriers: A Proposal for Change*, 45 N.Y.U. L. REV. 517 (1970); Comment, *Presidential Powers over the Awarding of International Air Routes*, 48 TUL. L. REV. 1176 (1974).

252. 564 F.2d 458 (D.C. Cir. 1977). See also the special concurring opinion filed by MacKinnon, J., in *Home Box Office*, 567 F.2d at 61-64, retreating from the broadly stated per curiam decision that he had earlier joined.

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was explained fully and sufficiently within the confines of the rule-making record, and that interests not present at the critical meeting had a full opportunity to comment on the wisdom of self-regulation.²⁵³ In short, unlike the situation in *Home Box Office*, the facts did not suggest that participants in public rulemaking proceedings had been unfairly treated, or that reasons unknown to interested parties may have accounted for the agency's final decision. The fundamental premises of the two decisions thus largely coincided; the dispute was over the authority and necessity for *Home Box Office's* broad remedy.

Similarly, in its recent *Vermont Yankee* decision, the Supreme Court clearly disapproved of *Home Box Office's* remedial creativity by holding that lower federal courts may not order agencies to engage in rule-making procedures not specified in the APA or another governing statute.²⁵⁴ At the same time, the *Vermont Yankee* Court held that the court of appeals must review agency rules in light of the administrative record²⁵⁵ and must set them aside under the APA if "arbitrary, capricious, [or] an abuse of discretion."²⁵⁶ The Court recognized that it is often difficult to distinguish the legitimate judicial invalidation of a rule for insufficient explanation from the forbidden imposition of special procedures on agency rulemaking.²⁵⁷ Thus, if facts similar to those of *Home Box Office* lead a reviewing court to void a resulting rule, it may be difficult to ascertain whether the court is merely asking that the record contain the rule's real basis, or whether it is ordering the agency to ban further ex parte activity. *Vermont Yankee* has created an uneasy distinction between reviewing the adequacy of an agency's record and requiring special procedures.

The central problem is one of reconciling the APA's judicial review requirements with its rulemaking procedures, which do not define a record for review.²⁵⁸ The Court has repeatedly adverted to the "administrative record," but this does not explain whether that record must contain all ex parte information reaching the agency. There are strong arguments that not every such item need enter the record: the *Vermont Yankee* Court emphasized both the need for preserving the procedural flexibility of informal rulemaking²⁵⁹ and the inappli-

253. 564 F.2d at 471-73, 477-78.

254. See p. 460 *supra*.

255. 435 U.S. at 549 (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973)); see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (Court reviews "full administrative record").

256. 5 U.S.C. § 706(2)(A) (1976).

257. 435 U.S. at 539-41.

258. See p. 453 *supra*.

259. 435 U.S. at 547.

cability of due process strictures to most rulemaking.²⁶⁰ Moreover, Congress's decision not to extend its recent prohibition of ex parte contacts in adjudication to rulemaking at least means that it does not consider an unqualified ban to be appropriate in that context.²⁶¹ Nevertheless, the procedures employed in rulemaking must satisfy the goals of essential fairness that both Congress and the courts have pursued in recent years. *Home Box Office* makes clear that ex parte contacts can impair these central goals of fairness to interested persons, reasoned agency decisionmaking based on some kind of a record, and ease of judicial review.

The threat to these fairness goals is particularly severe if the President is involved in the ex parte contacts. His personal and institutional power potentially can deflect an agency from a decision that is otherwise consistent with both the record before it and the governing statute. Although deviation from such a decision may be supported by other evidence in the record and elements of the governing statute, essential fairness may be violated if the deviation resulted from a President's desire to advance a particular interest.²⁶²

Because of this danger, it is necessary to impose procedural rules for presidential intervention similar to those mandated by the *Home Box Office* court,²⁶³ with one principal difference. Instead of seeking to prevent ex parte communications from the White House during the rulemaking period, they should be encouraged but channeled into the public record. This approach would permit White House participation but also would make possible meaningful judicial review and would promote the likelihood that the proceedings are fair.²⁶⁴

Two countervailing considerations must be reckoned with in formulating this approach; one is practical, the other legal. First, it seems impracticable to require a complete public record of every instance of presidential participation in rulemaking. Must every presidential

260. *Id.* at 542-44.

261. *See* p. 501 *supra*.

262. The incident described at p. 466 *supra* may be an example of this. *See* also pp. 464-65 *supra* for problems in the implementation of "Quality of Life" review.

263. After *Vermont Yankee*, the courts are not free to impose such a requirement. Any presidential initiative for substantive review of rulemaking should impose it by executive order, to maintain fairness and to avoid judicial invalidation of rules affected by ex parte contacts. Such an order should be accorded binding effect until rescinded. *See generally* Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629 (1974).

264. Presidential orders that require an agency to change its internal procedures for rulemaking, for example by issuing regulatory analyses with rules, presumably would not engender ex parte contacts regarding particular rules. To the extent that procedural requirements produce ex parte contacts, those communications should be included in the approach explained here.

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remark after a Cabinet meeting and every newspaper report of White House reaction to a proposed rule be included if they reach the rule-maker? The core purpose behind placing communications on the record would call for a formal means of communicating White House views to the rulemaking agency; whether in the form of written submissions or meetings, these contacts should be on the record.²⁶⁵ Surrounding informal contacts should not be prohibited if information and policy analysis are to flow freely to and from the rulemaking agency. The requirement of putting all communications on the record could be met if written documents and summaries of oral contacts were added to the public record for each rulemaking docket. Until individual agencies develop clear procedures for these matters,²⁶⁶ common sense dictates that any communication adding something new ought to be placed on the record, especially if there seems any likelihood that the agency will rely on it in its formulation of the final rule.²⁶⁷ Even some duplicate material should be placed on the record if it comes from a new source—like the White House—that may contribute determinative influence. These techniques would help to ensure that the record reflects all significant influences on a rule.

This approach could be undermined by the doctrine of executive privilege defined in *United States v. Nixon*.²⁶⁸ *Nixon*, however, does not support a limitless executive privilege for communications addressed throughout the executive establishment; the case focused on deliberations within the White House. Indeed, the Court held that unless linked to a particular need to protect military secrets or the like, the privilege would not overcome a demonstrated need for disclosure. This suggests that absent a particular need for secrecy, *Nixon* does not support confidentiality for presidential participation in rule-making.²⁶⁹

What approach to ex parte contacts should govern the communications of other agencies participating in interagency review? Although

265. Meetings may produce either transcripts or minutes. Congress has recently prescribed procedures for preserving the contents of closed meetings. See 5 U.S.C. § 552(b) (1977).

266. The FTC has already adopted constraints on ex parte communications in its rule-making that are similar to those described in text. See 16 C.F.R. § 4.7 (1978). Other agencies have begun to regulate ex parte communications with varying degrees of stringency. See 14 C.F.R. § 300.2-3 (1978) (CAB); 17 C.F.R. § 200.111 (1977) (SEC); 29 C.F.R. § 2200.103 (1977) (Occupational Safety and Health Review Commission).

267. It appears that the *ACT* court concluded that the private meeting was not determinative of the agency decision while the *Home Box Office* court concluded that the agency did rely on ex parte contacts in that case.

268. 418 U.S. 683 (1974); see pp. 483-84 *supra*.

269. Similarly, Congress does not enjoy special confidentiality for its contacts during agency decisionmaking. See notes 240, 242 *supra*.

pressure from agencies other than the White House does not pose so great a threat to the integrity of the rulemaking process because less leverage is present, there remains ample reason to require the process to be open. As the history of OMB's "Quality of Life" review demonstrates, agencies differ in their policy orientation and in their responsiveness to constituent interest groups; moreover, they do not lack the means to harm one another in the bureaucracy.²⁷⁰ Interagency pressure is effective enough to warrant its placement on the record where it can be seen.²⁷¹ This seems the only way to reconcile the sometimes conflicting overall purposes of ensuring both the political accountability and the legality of agency rules.

E. *Constitutional Checks on Presidential Power*

The federal courts and Congress must be able to check presidential supervision of rulemaking if it is not to cause an imbalance in our constitutional scheme. The courts should have no special difficulty in reviewing procedural directives on their face. Nor do issues of *ex parte* influence pose grave institutional difficulties—the courts have already placed some limits on *ex parte* influence in rulemaking. More serious problems, however, might attend judicial review of the

270. See pp. 464-65 *supra*.

271. In terms of the source of a contact, it seems practical to treat any communication originating beyond the rulemaking agency as external for purposes of the record. This principle should adequately respond to the *Vermont Yankee* Court's emphasis on the predictability of judicial review. See 435 U.S. at 546-47. Moreover, it would allow confidentiality for the internal deliberation that precedes adoption of any rule. The importance of this interest was recognized in *Nixon*, 418 U.S. at 705-07, and has been recognized in statutory form. The Freedom of Information Act exempts from disclosure to the public both intra-agency *and* interagency memoranda, 5 U.S.C.A. § 552(b)(5) (West 1977), if they "would not be available by law to a party other than an agency in litigation with the agency." The Act is not affirmative authority, however, for withholding information. *Id.* § 552(c).

The approach of the courts has been to rely on congressionally imposed requirements that rules be fully explained and their factual basis revealed as a way to flush out onto the record those internal data and arguments having an effect on a final rule. See p. 455 *supra*. Interagency communications, however, do not stand on the same footing, since they may come from a source having a policy orientation quite different from that of the rulemaking agency, and practical power to deflect the rulemaker from his statutory criteria for decision. Interagency communications will also reflect the substantially lessened familiarity with the rulemaking record of those outside the agency that is compiling it. They are thus "external" influences in a very real sense, and should appear on the record. *But see* Pedersen, *supra* note 7, at 58-59 (differences between internal and external influences on agency can be overstated). A distinction between intra-agency and interagency communications would also have the practical advantage of relative clarity. The APA draws the line at this point for its proscription of *ex parte* influences on adjudication. 5 U.S.C. § 557(d) (1976). These considerations seem sufficient to take interagency communications out of the constitutional executive privilege recognized in *Nixon*.

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basis for a substantive directive. The courts may be able to engage in the same process for this purpose as the one that they have developed to review the administrative record and formal explanations accompanying agency rules: the courts presently review for rationality, procedural regularity, and conformity to statutory and constitutional authority.²⁷² If the courts treat both presidential and agency explanations as part of the basis of a final rule,²⁷³ there will be an opportunity for agency expertise to inform and confine presidential discretion through the agency contributions to the rulemaking record. The President will retain the opportunity to resolve ultimate value choices within the alternatives left open by statute. Moreover, the very requirement that presidential directives be explained sufficiently to survive normal judicial review of rulemaking should provide a practical check on the frequency with which Presidents will exercise this power.

Still, there is reason to doubt the efficacy of judicial review of a presidential statement of necessity in support of a directive. The courts may have trouble reviewing presidential initiatives in matters traditionally accorded wide executive discretion.²⁷⁴ For example, the courts may not know how to review a presidential directive affecting the interest rate set by the FRB if the President's explanation includes balance-of-trade concerns. Yet the limited scope of judicial review should make feasible even review of these kinds of explanations; the courts are called upon to scrutinize only the rationality, not the correctness of the executive decision.²⁷⁵ The courts may find some matters covered by presidential directives to be nonreviewable,²⁷⁶ but the courts should feel competent to perform their task on the usual subjects of economic and social rulemaking.

When judicial review of presidential action is hampered, the capacity of Congress to restrain the President assumes special importance. Presidential directives force Congress to pass legislation if it

272. 5 U.S.C. § 706 (1976). See generally *Camp v. Pitts*, 411 U.S. 138 (1973).

273. 5 U.S.C. §§ 553, 706 (1976) should provide the statutory warrant for such a process.

274. In *Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948), the Court held presidential review of CAB foreign route awards to be nonreviewable. The Court viewed final executive approval of the route as a "political question," and held that disclosure of grounds for the decision, which is the essence of judicial review, might reveal secret "intelligence" to which the President was privy. *Id.*

275. *Ethyl Corp. v. EPA*, 541 F.2d 1, 68-69 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976) (statement of Leventhal, J.).

276. See Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 HARV. L. REV. 367 (1968); Note, *The Supreme Court's Use of Statutory Interpretation: Morris v. Gressette, APA Nonreviewability, and the Idea of a Legislative Scheme*, 87 YALE L.J. 1636 (1978).

wants to change presidential policy, and probably to muster the two-thirds majority necessary to override a veto.²⁷⁷ To some extent, this situation obtains whenever Congress delegates discretion to executive officers, who often run the risk that legislation will be passed to override their policy decisions. The special effect of presidential action would be to shift executive discretion to its most powerful locus. Nevertheless, the situations that strain the effectiveness of judicial review of presidential action do not necessarily portend a similar institutional disability for Congress. Even when foreign affairs or national defense are the basis for a presidential directive, the directive only changes an agency regulation. Although Congress has experienced difficulties in checking such activities as presidential war-making, there seems no reason to fear congressional inability or unwillingness to join issue with a President over supervision of rule-making. Held in check by both Congress and the courts,²⁷⁸ presidential initiatives in agency regulation can support the constitutional scheme of mutually limiting powers, while increasing the rationality and political accountability of agency rulemaking.

277. See p. 462 *supra*.

278. Concern that judicial review of presidential action might prove ineffective is matched by concern that it can prove too effective—by interfering with the implementation of statutory programs. Private parties may seek to enforce a presidential order and delay agency rulemaking. It may be possible for the President to forbid such review in whole or in part, although he should not be able to foreclose review of the validity of the order. There is substantial authority for the President's power to avoid private enforcement of Executive Order No. 12,044 which states an intention to avoid expanding judicial review of agency action. See *Independent Meat Packers Ass'n v. Butz*, 529 F.2d 228, 314 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976) (denying private civil action to enforce presidential order because order in question "was intended primarily as a managerial tool for implementing the President's personal economic policies and not as a legal framework enforceable by private civil action"). If the parties in *Meat Packers* had not had standing on a basis independent of their request for review of the agency's compliance with the order, the court could have dismissed the suit entirely. For the most part, it seems permissible for the President to foreclose judicial review of agency compliance with the order by those without an independent basis for obtaining review. The public has an opportunity to participate in the enforcement process by commenting on agency compliance reports. Where an independent basis for private standing exists, however, the courts should review agency compliance with an order to the extent that the private party can plausibly claim to have been affected by noncompliance. See Note, *supra* note 263.

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