

## NOTE

### IRRELEVANT OVERSIGHT: “PRESIDENTIAL ADMINISTRATION” FROM THE STANDPOINT OF ARBITRARY AND CAPRICIOUS REVIEW

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*The president is now regularly and heavily involved in the decision-making processes of administrative agencies. What began in the mid-twentieth century as macro-level oversight has evolved, since the Reagan Administration, into controlling case-level influence. Scholars have hotly debated the legality of this shift and have compellingly demonstrated the need to ensure that agencies remain accountable and that their decisions remain nonarbitrary in the face of presidential involvement. However, as this Note demonstrates, the existing scholarship has not provided an adequate solution to these twin problems.*

*This Note provides a novel and effective solution to the accountability and arbitrariness problems of presidential involvement by re-examining the doctrine of arbitrary and capricious review. Contrary to contemporary practice, this Note argues that while arbitrary and capricious review is never directly applicable to the president’s actions, it is always applicable to agency decisions that the president has influenced. It introduces a bifurcated framework for applying arbitrary and capricious review based on an initial determination of whether Congress has delegated directive authority to the president or the agency. It then demonstrates that arbitrary and capricious review is a better solution to the accountability and arbitrariness problems of presidential involvement than other suggestions in the existing literature.*

#### TABLE OF CONTENTS

INTRODUCTION .....	644
I. THE ORIGINS AND STRUCTURE OF PRESIDENTIAL INVOLVEMENT .....	646
A. <i>The Birth of the Administrative Agency and the        Predominance of Informal Rulemaking</i> .....	646

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B.	<i>The Rise and Expansion of Presidential Involvement</i> .....	649
1.	<i>Historical Models of the Administrative State</i> .....	649
2.	<i>The Expansion of Presidential Involvement</i> .....	652
II.	THE CONTEMPORARY CRITIQUE OF PRESIDENTIAL INVOLVEMENT AND THE INADEQUACY OF PREVIOUSLY ADVOCATED SOLUTIONS.....	654
A.	<i>The Accountability Critique of Presidential Involvement</i> ..	654
B.	<i>The Arbitrariness Critique of Presidential Involvement</i> ....	656
C.	<i>The Inadequacy of Previously Suggested Solutions</i> .....	658
III.	ARBITRARY AND CAPRICIOUS REVIEW AS A MEANS OF LIMITING PRESIDENTIAL ADMINISTRATION .....	663
A.	<i>A Model for the Application of Arbitrary and Capricious Review in Situations of Presidential Involvement</i> .....	664
1.	<i>Where the Agency Holds Directive Authority</i> .....	664
2.	<i>Where the President Holds Directive Authority</i> .....	666
B.	<i>Overcoming Obstacles to the Application of Arbitrary and Capricious Review in Situations of Presidential Involvement</i> .....	667
C.	<i>Arbitrary and Capricious Review as a Solution to the Accountability and Arbitrariness Critiques of Presidential Involvement</i> .....	671
CONCLUSION	.....	673

## INTRODUCTION

The intensification of presidential involvement in agency decision making is one of the most pronounced developments in the past half-century of American administrative law. What began in the mid-twentieth century as macro-level oversight has morphed, since the Reagan Administration, into controlling, case-level influence.<sup>1</sup> Scholars have recognized the magnitude of this transition, and the debate over its legality is now long standing. Some laud the stabilizing tendencies of intensive presidential involvement and justify it by reference to constitutional language.<sup>2</sup> Others condemn it as unconstitutional overreaching and decry its disruptive policy implications.<sup>3</sup>

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1. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

2. E.g., Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 823 n.6 (2003); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

3. E.g., Michele Estrin Gilman, *If at First You Don't Succeed, Sign an Executive Order: President Bush and the Expansion of Charitable Choice*, 15 WM. & MARY BILL RTS. J. 1103, 1144–51 (2007); Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); see also Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH L. REV. 53 (2008) (explaining that some level of agency insulation is preferable to absolute presidential control for maximizing the overlap between voters’ policy preferences and agencies’ policy decisions).

While the debate rages on, however, “Presidential Administration” has become a fact of life.<sup>4</sup>

Accepting this, most contemporary scholars have focused on defining the necessary limitations on presidential involvement and elucidating the best means of effectuating them.<sup>5</sup> These scholars have compellingly articulated the need to ensure that agency decisions remain accountable<sup>6</sup> and nonarbitrary<sup>7</sup> in the face of presidential involvement. Their proposed solutions have spanned the map, meanwhile, and have drawn as heavily from the Framers’ intent as from contemporary statutes and case law.<sup>8</sup> But these scholars have given short shrift to what is perhaps the most obvious and practical means of ensuring accountability and nonarbitrariness: the doctrine of arbitrary and capricious review, which requires agencies to base their decisions upon relevant factors.<sup>9</sup> While arbitrary and capricious review is never directly applicable to the president’s actions,<sup>10</sup> it is always applicable to agency decisions—including those that the president has influenced.<sup>11</sup> Scholars have failed to recognize the full implications of this point,<sup>12</sup> and the judiciary has shown undue reluctance to apply arbitrary and capricious review in cases of presidential involvement.<sup>13</sup> As a result, the limits on presidential involvement remain both ambiguous and insufficient.<sup>14</sup>

This Note argues that arbitrary and capricious review can be easily and appropriately applied to agency decisions, *even* in cases of presidential

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4. Kagan, *supra* note 2, at 2383–84. Elena Kagan coined the term “Presidential Administration” as a reference to the modern administrative state and the high degree of presidential involvement in agency decision making. *Id.*

5. Bressman, *supra* note 1, at 534 (arguing that agencies should provide standards limiting their own and the president’s decision-making discretion); Kagan, *supra* note 2, at 2376–77 (suggesting that courts should reserve *Chevron* deference for cases involving overt presidential involvement); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 *COLUM. L. REV.* 263, 314 (2006) (“Several formal features of the broad *Skidmore* standard could provide a baseline for agency consideration of the presidential directives that do not legally bind the agency’s discretion.”).

6. Kagan, *supra* note 2, at 2333. The accountability critique of presidential involvement is explained in Section II.A.

7. Bressman, *supra* note 1, at 503–04. The arbitrariness critique of presidential involvement is explained in Section II.B.

8. *See* sources cited *supra* note 5.

9. *See infra* notes 36–39 and accompanying text.

10. *See* *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

11. The Administrative Procedure Act (“APA”) provides that arbitrary and capricious review is applicable to all categories of agency decision making. 5 U.S.C. §§ 553, 554, 706 (2006). For an explanation of the four main categories—formal adjudication, informal adjudication, formal rulemaking, and informal rulemaking—see *infra* Section I.A. For informal agency decisions, arbitrary and capricious review is the *only* APA-prescribed standard of review. 5 U.S.C. §§ 553, 706. In asserting that the APA is “always” applicable to agency decisions, I assume for the sake of analysis that the exceptions in § 701(a)(1) (for decisions made nonreviewable by statute) and § 701(a)(2) (for decisions “committed to agency discretion by law”) do not apply.

12. *See infra* text accompanying notes 173–180.

13. *See infra* Section III.B; *infra* note 100 and accompanying text.

14. *See infra* Section III.B; *infra* note 100 and accompanying text.

involvement; that courts are not currently applying it as fully or as broadly as they should; and that, if meaningfully applied, such review would best address the accountability and arbitrariness concerns of contemporary scholars. Part I examines the origins and structure of presidential involvement in agency decision making and describes the administrative context in which it takes place. Part II outlines the contemporary debate over presidential involvement, breaking the debate into critiques based on accountability and arbitrariness, and shows why previously suggested solutions to these critiques are insufficient to address the problems they raise. Part III concludes by applying arbitrary and capricious review to develop a novel and effective solution to the accountability and arbitrariness critiques of presidential involvement.

### I. THE ORIGINS AND STRUCTURE OF PRESIDENTIAL INVOLVEMENT

The president's involvement in agency decision making is enabled, shaped, and limited by the characteristics of agencies themselves. This Part aims to situate the intensification of presidential involvement in relevant administrative context. Section I.A describes the birth and development of the administrative state. It explains how informal rulemaking became the predominant form of agency decision making and hence the focal point of presidential involvement. It also shows how courts expanded on the procedural requirements for informal rulemaking and how these requirements provided the foundation for modern arbitrary and capricious review. Section I.B explores the historical evolution of the administrative state, explaining the emergence and intensification of presidential involvement as a logical outgrowth from earlier administrative models but an imperfect means of correcting their deficiencies.

#### A. *The Birth of the Administrative Agency and the Predominance of Informal Rulemaking*

Though now taken for granted as a necessary and large part of the federal government, administrative agencies are in fact a relatively recent phenomenon.<sup>15</sup> In the 1930s and 1940s, the government's recognition of new social and economic rights and assumption of new positive duties led to a large increase in government work.<sup>16</sup> Congress in turn delegated much of this work to newly created agencies.<sup>17</sup> The popularity of the initial New Deal agencies would wane in the ensuing years.<sup>18</sup> However, once the Supreme Court had assuaged the separation-of-powers concerns that attended its initial emergence, the burgeoning administrative state had a green light for

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15. STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 18 (6th ed. 2006).

16. *See id.* at 18–19.

17. *See id.*

18. *Id.*

development.<sup>19</sup> And develop it did. Today, more than two million people work in administrative agencies, regulating everything from labor relations to environmental policy.<sup>20</sup> The work of the federal government is, in a very real sense, the work of agencies.

The work of agencies has also largely assumed a common form—informal rulemaking<sup>21</sup>—which today serves as the focal point of presidential involvement. Passed in 1946 as an attempt to rein in administrative discretion, the Administrative Procedure Act (“APA”) establishes the procedural framework that agencies must abide by in exercising their quasi-legislative and quasi-judicial authority.<sup>22</sup> It delineates four categories of agency decision making: formal rulemaking, informal rulemaking, formal adjudication, and informal adjudication.<sup>23</sup> The requirements of formal decision making are relatively demanding. They impose record keeping and evidentiary standards akin to those that would accompany a trial or the passage of legislation.<sup>24</sup> The requirements of informal decision making, by contrast, are decidedly minimal.<sup>25</sup> In grappling with the APA’s procedural constraints, agencies naturally incline toward the efficiency and autonomy of informal decision making. Most gravitate toward informal rulemaking in particular, since agencies can evade the need to adjudicate individual cases through the development of generally applicable rules.<sup>26</sup> Courts have historically deferred to agencies’ preferences in this regard. They permit broad discretion in the choice between rulemaking and adjudication,<sup>27</sup> allow the use of rules to preclude case-by-case adjudication,<sup>28</sup> and only require formal procedures in rare, well-defined circumstances.<sup>29</sup> The predominance of informal rulemaking dictates that presidential involvement usually takes place against this decision-making backdrop.

While courts have historically deferred to agencies’ preference for informal rulemaking, they have nevertheless expanded on the APA-specified procedures for informal rulemaking to provide more elaborate requirements

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19. *Id.* at 20–29.

20. U.S. CENSUS BUREAU, FEDERAL GOVERNMENT CIVILIAN EMPLOYMENT BY FUNCTION: DECEMBER 2006 (2006), <http://ftp2.census.gov/govs/apes/06fedfun.pdf>.

21. BREYER ET AL., *supra* note 15, at 494, 520.

22. Administrative Procedure Act, 5 U.S.C. §§ 551–59, 701–06 (2006).

23. *Id.* §§ 553–54, 556–57.

24. *Id.* §§ 556–57.

25. The APA requires a simple notice-and-comment procedure for prospective informal rules and a “concise general statement” for final informal rules. *Id.* § 553.

26. *See* BREYER ET AL., *supra* note 15, at 494, 520.

27. SEC v. Chenery Corp., 332 U.S. 194, 202–03 (1947).

28. Fed. Power Comm’n v. Texaco, Inc., 377 U.S. 33, 39–45 (1964) (holding that adversarial hearings are not required on a case-by-case basis when the precise policy issue has been addressed through informal rulemaking).

29. *See* United States v. Fla. E. Coast Ry., 410 U.S. 224, 234 (1973) (explaining that agencies are only obliged to use formal procedures when the authorizing statute requires them to make decisions “on the record after opportunity for an agency hearing”).

and, consequently, a more coherent framework for presidential involvement. By the terms of section 553 of the APA, agencies need only provide interested parties with notice and an opportunity to comment on their proposed rules and issue “concise general statement[s]” of the reasons motivating their final rules.<sup>30</sup> There is no explicit requirement that they provide rational explanations or keep anything resembling a traditional record. Beginning in the 1970s, however, courts used aggressive statutory interpretation to transform the APA’s notice-and-comment procedure into an elaborate “paper hearing” process.<sup>31</sup> In addition to providing notice, agencies now have to provide all relied-upon evidence to would-be commenters.<sup>32</sup> On top of providing a “concise general statement,” they must address significant adverse comments and provide rational explanations for their final rules.<sup>33</sup> Finally, courts must review agency decisions based on the reasons agencies provide.<sup>34</sup> The Supreme Court resisted a lower court’s call for further constraints in *Vermont Yankee Nuclear Power Corp. v. NRDC*, but it suggested that additional procedures might become appropriate under “extremely compelling” circumstances.<sup>35</sup>

The judiciary’s development of paper hearing requirements also facilitated its application of arbitrary and capricious review and its considerable elaboration on the meaning of that standard. By the terms of section 706 of the APA, courts must set aside agency actions that are “arbitrary, capricious . . . or otherwise not in accordance with law.”<sup>36</sup> The APA’s lack of explicit record requirements for agency decision making made this standard difficult to implement in informal contexts before the advent of paper hearings. However, as courts began to apply section 553 more aggressively, they viewed section 706 in a similar light. In a string of landmark decisions, the Supreme Court interpreted section 706 to require that agencies base their decisions on “relevant factors,”<sup>37</sup> refrain from considering nonrelevant factors,<sup>38</sup> and give each relevant factor its appropriate weight in the decision-making process.<sup>39</sup> For the purpose of arbitrary and capricious review,

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30. 5 U.S.C. § 553.

31. BREYER ET AL., *supra* note 15, at 536. The judiciary’s aggressive development of paper hearing requirements reflected the shift from an “expertise” model to an “interest group representation” model of agency action. *See* Bressman, *supra* note 1, at 473–74; *see also infra* Section I.B.2.

32. *See, e.g.*, *United States v. Nova Scotia Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (requiring disclosure of scientific data).

33. *Id.*

34. *Id.* at 245.

35. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978); *see also Asarco, Inc. v. EPA*, 616 F.2d 1153, 1159 (9th Cir. 1980).

36. 5 U.S.C. § 706 (2006).

37. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

38. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

39. *Id.* (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence

relevance is judged by reference to statutory language: a factor is relevant if Congress intended the agency to consider it in the decision-making process and irrelevant if not.<sup>40</sup> Courts generally review agencies' decisions based on the materials they provide,<sup>41</sup> but evidence of nonrelevant considerations can lead them to demand additional information.<sup>42</sup>

### B. *The Rise and Expansion of Presidential Involvement*

The administrative state has undergone many changes since its initial emergence: as legal and political moods have shifted, so too have the institutional dynamics of the administrative state. Scholars typically talk about this evolution in terms of discrete administrative models. Each model responded to the unique legal and political concerns of its day, stemmed logically from the previous models, and came about through the actions of courts and other government actors.<sup>43</sup> This Section puts presidential involvement in this institutional context—as a phenomenon best explained by the succession of several administrative models culminating in the current “presidential control” model—and then traces its expansion since the 1980s.

#### 1. *Historical Models of the Administrative State*

Courts and other government actors originally conceived of the administrative state in response to the separation-of-powers concerns that attended its emergence.<sup>44</sup> The Constitution vests lawmaking power in Congress, executive authority in the president, and adjudicative power in a Supreme Court.<sup>45</sup> It says nothing about administrative agencies, however, and this lack of textual support casts agencies' operations in a suspicious hue—as a threat to the tripartite rule of law the Constitution anticipates.<sup>46</sup>

The first model of the administrative state, the “transmission belt” model, aimed to address these concerns by characterizing agencies as the mindless executors of congressional will. Congress passed clear statutes,

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before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”). In *State Farm*, the petitioners challenged the National Highway Traffic Safety Administration's (“NHTSA”) attempted rescission of existing passive-restraint regulations. The majority opinion seemed to be saying that the NHTSA had not given one relevant factor its proper weight: while the agency had clearly *considered* the benefits of existing passive-restraint regulations, it did not give the factor sufficient weight in determining that there was “‘substantial uncertainty’ that the regulation [would] accomplish its intended purpose.” *See id.* at 51–52.

40. *See id.*

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

42. *See* Gordon G. Young, *Judicial Review of Informal Agency Action on the Fiftieth Anniversary of the APA: The Alleged Demise and Actual Status of Overton Park's Requirement of Judicial Review “On the Record”*, 10 ADMIN. L.J. AM. U. 179, 239 (1996).

43. *See, e.g.*, Bressman, *supra* note 1, at 462–78; Kagan, *supra* note 2, at 2255–72.

44. Bressman, *supra* note 1, at 470; Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1672–76 (1975).

45. U.S. CONST. arts. I, II, III.

46. *See* Stewart, *supra* note 44, at 1672–76.

according to the model, and agencies carried out their unambiguous directives.<sup>47</sup> Courts played along by declining to question agencies too heavily.<sup>48</sup> But as agencies' independent discretion became clear, the transmission belt model lost credibility.<sup>49</sup>

The second, "expertise" model presented a temporary fix by characterizing agency bureaucrats as specialized professionals.<sup>50</sup> It was now clear that agencies exercised independent discretion.<sup>51</sup> However, courts and legislators urged that it was acceptable for agencies to do so because they were uniquely qualified and because they were isolated from the political pressures that might dissuade them from wielding their discretion objectively.<sup>52</sup> Congress could not accumulate the expertise necessary to legislate unambiguously in every realm of life, the argument ran, and so it delegated the responsibility for elucidation—gap-filling authority—on those with the requisite knowledge and training.<sup>53</sup> This model sufficed during the New Deal and lasted through the middle of the twentieth century.<sup>54</sup> Yet it began to break down as the public's distrust of government reached new heights in the 1960s and 1970s.<sup>55</sup> The guise of expertise was sufficient insofar as agency decision making involved the application of objective, technical know-how.<sup>56</sup> But agencies handled routine matters too, and their insulation was imperfect; they had political biases and subjective opinions just like their congressional appointers.<sup>57</sup> The only difference was that members of Congress were elected for theirs, and their decision making seemed more legitimate as a result.

As the administrative state underwent further revision during the 1970s, a curious shift occurred. The transmission belt and expertise models had aimed to ameliorate arbitrariness concerns by showing that administrative gap filling was different from legislating or adjudicating.<sup>58</sup> But their successor—the "interest group representation" ("IGR") model—sought to legitimate agencies by making them politically accountable.<sup>59</sup> The IGR movement was largely driven by courts; they developed the requirements of paper hearings and arbitrary and capricious review with an eye toward

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47. *Id.* at 1675.

48. *Id.* at 1674–76.

49. Bressman, *supra* note 1, at 471; Stewart, *supra* note 44, at 1676–78.

50. *See* Bressman, *supra* note 1, at 471–72; Stewart, *supra* note 44, at 1677–78.

51. Bressman, *supra* note 1, at 471–72; Stewart, *supra* note 44, at 1677–78.

52. *See* Bressman, *supra* note 1, at 471–72; Stewart, *supra* note 44, at 1677–78.

53. *See* Bressman, *supra* note 1, at 471–72; Stewart, *supra* note 44, at 1677–78.

54. Bressman, *supra* note 1, at 474–75.

55. *Id.*

56. *See id.*; Stewart, *supra* note 44, at 1678.

57. *See* Bressman, *supra* note 1, at 472; Stewart, *supra* note 44, at 1678–79.

58. Stewart, *supra* note 44, at 1672–75.

59. Bressman, *supra* note 1, at 475–78.

accountability.<sup>60</sup> It conceived of agency decision making (and informal rulemaking in particular) as a miniaturized political process. The new court-imposed requirements aimed to ensure that all interested parties could meaningfully participate in this process—that they were involved in notice and comment and that agencies would be made to consider their input in a cognizable way.<sup>61</sup> While IGR did not directly address the earlier models' arbitrariness concerns, the clear implication was that accountability would itself suffice to check agency discretion.<sup>62</sup> Yet some groups still seemed more powerful than others under the IGR model,<sup>63</sup> and many believed that the most powerful and well-represented parties could “capture” agency decisions.<sup>64</sup> As these fears of agency capture accelerated and the model's costs were seen to outweigh its benefits, IGR lost its legitimacy.<sup>65</sup>

The current “presidential control” model targets the shortcomings of IGR while maintaining its emphasis on accountability and its failure to account for arbitrariness. From this perspective, the president is justified in taking a personal, heavy-handed role in the management of administrative decision making. By rendering agencies' decisions dependent on the president's approval, it is assumed, we can make them accountable to a national electorate by proxy.<sup>66</sup> This tempers the problem of agency capture insofar as the president is compelled to address and reflect majority opinions and to formulate his administrative agenda in line with them.<sup>67</sup> It also addresses the inefficiency of paper hearings if we can assume that the president, as a single authoritative figure, is more capable of facilitating notice and comment than a many-headed agency.<sup>68</sup> The presidential control model came about as presidents, taking advantage of the IGR model's failure and changing public perceptions, became more actively involved in agency decision making.<sup>69</sup> It has expanded rapidly since the 1980s, and because it maintains the IGR model's emphasis on accountability, its expansion signals that the problem of agency arbitrariness has received scant attention of late.<sup>70</sup>

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60. *Id.* at 476–77.

61. *Id.*

62. *Cf. id.* at 469 (“[T]he concern for arbitrariness became the recessive theme and the concern for accountability became the dominant one.”).

63. *Id.* at 485.

64. *Id.*; Croley, *supra* note 2, at 834.

65. *See* Bressman, *supra* note 1, at 485.

66. *See* Kagan, *supra* note 2, at 2331–32.

67. *Id.* at 2335.

68. *Id.* at 2332–33.

69. *See generally* Strauss, *supra* note 3.

70. *See* Bressman, *supra* note 1, at 463–64 (“The presidential control model misleads us into thinking that accountability is all we need to assure ourselves that agency action is constitutionally valid.”).

## 2. *The Expansion of Presidential Involvement*

The Constitution provides no express basis for presidential involvement in agency decision making, and presidents refrained from such involvement before the advent of the presidential control model.<sup>71</sup> Together, the Appointments and Opinions Clauses give the president sole authority to appoint “officers of the United States” and to solicit their opinions on matters of law.<sup>72</sup> The Take Care Clause<sup>73</sup> saddles the president with a more general and expansive duty to manage and coordinate the various executive agencies.<sup>74</sup> But the Constitution contains no explicit authorization for the president to *direct* agency decision making. It draws no lines between procedural oversight and substantive guidance and declines to say how much involvement is too much.<sup>75</sup> In the face of this constitutional silence, early presidents were deferential to agency decision making and took care not to appear interested or involved in individual case outcomes.<sup>76</sup> Congress overtly encouraged this stance.<sup>77</sup>

President Nixon began the sustained trend toward increased presidential involvement.<sup>78</sup> Nixon formed the Office of Management and Budget (“OMB”) from the existing Bureau of the Budget and directed it to perform “Quality of Life” review—which involved circulating proposed rules within the executive branch for comment and criticism—for select classes of agency regulations.<sup>79</sup> Presidents Ford and Carter built on Nixon’s precedent by requiring agencies to submit “major” rules to a Council on Wage-Price Stability and a Regulatory Analysis Review Group.<sup>80</sup> These measures did not impose legal constraints on agency action, but they signaled a break from the past and inspired future presidents to make further encroachments into agencies’ autonomy.<sup>81</sup>

President Reagan expanded these inroads at the beginning of the 1980s, just as scholars were decrying the bankruptcy of the IGR model and a revival of majoritarian thinking had brought the president to the figurative

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71. See generally Kagan, *supra* note 2, at 2272–74.

72. U.S. CONST. art. II, § 2, cls. 1–2. The president may also remove appointed officers, subject to the minor limitations prescribed by *Morrison v. Olson*. See *Morrison v. Olson*, 487 U.S. 654, 669 (1988) (inquiring as to whether the Ethics in Government Act “interfere[d]” with the president’s “take care” authority).

73. U.S. CONST. art. II, § 3.

74. Stack, *supra* note 5, at 270–73. The president is typically only involved in the decision making of executive agencies, as opposed to independent agencies, but the expansion of the presidential control model has given him additional control over independent agencies of late. See *infra* note 89 and accompanying text.

75. See Stack, *supra* note 5, at 270–73.

76. Kagan, *supra* note 2, at 2277.

77. *Id.* at 2274–76.

78. *Id.* at 2276.

79. *Id.*

80. *Id.*

81. *Id.* at 2276–77.

center of the American polity.<sup>82</sup> A momentous executive order required agencies to submit major rules to the Office of Information and Regulatory Affairs (“OIRA”), an office within the OMB, for prepublication review.<sup>83</sup> It also required agencies to accompany their submissions with “regulatory impact analyses” and cost-benefit analyses “to the extent permitted by law.”<sup>84</sup> Though disclaiming such authority, this order gave the president substantive control over agency decisions: OIRA had authority to determine the adequacy of the required analyses and to prevent a rule’s publication indefinitely.<sup>85</sup> A later executive order built on this framework by requiring agencies to submit “annual regulatory plan[s]” for the upcoming year,<sup>86</sup> giving OIRA even earlier opportunities to influence agency rulemaking.

While President George H. W. Bush largely followed Reagan’s example, Presidents Clinton and George W. Bush increased the intrusiveness of presidential involvement significantly. A Clinton executive order scaled back some of the Reagan orders’ breadth by requiring that OMB review take place during a specified window of time, broadening the number of factors that agencies could consider in their mandatory cost-benefit analyses, and requiring OIRA to disclose its communications with the agency in question and persons outside the executive branch.<sup>87</sup> But this order also delved into new territory by requiring executive agencies to designate Regulatory Policy Officers (“RPOs”) to serve as OIRA point-people<sup>88</sup> and by placing *independent* agencies under OIRA’s umbrella.<sup>89</sup> Even more importantly, it stipulated that the president would resolve agency-OMB disputes “to the extent permitted by law.”<sup>90</sup> Clinton expanded on the implications of these new requirements by directing agencies on how to take action in individual case settings and publicly taking credit for rulemaking outcomes.<sup>91</sup>

President George W. Bush increased the level of presidential involvement even further. He repeatedly asserted case-level authority by using signing statements to contest statutes delegating authority to agencies.<sup>92</sup> He also issued an executive order requiring that agency RPOs must be

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82. See Bressman, *supra* note 1, at 485–86.

83. Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1994), *reprinted as amended in* 5 U.S.C. § 601 (2006); Kagan, *supra* note 2, at 2278.

84. Kagan, *supra* note 2, at 2278 (citing Exec. Order No. 12,291, 3 C.F.R. at 128 (1982)).

85. *Id.*

86. *Id.* (citing Exec. Order No. 12,498, 3 C.F.R. 323 (1986), *reprinted in* 5 U.S.C. § 601 (1988), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638).

87. Exec. Order No. 12,866, 3 C.F.R. 638; Kagan, *supra* note 2, at 2285–87.

88. See Exec. Order No. 12,866, 3 C.F.R. 638.

89. Kagan, *supra* note 2, at 2288–90.

90. *Id.* (citing Exec. Order No. 12,866, 3 C.F.R. at 648).

91. *Id.* at 2290; Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT. L. REV. 965 (1997).

92. Strauss, *supra* note 3, at 701–02, 720 (citing Exec. Order No. 13,422, 3 C.F.R.191 (2008)).

presidential appointees and that “unless specifically authorized by the head of the agency,” no rulemaking may commence without RPO consent.<sup>93</sup> Under this scheme, an RPO need not report to an agency head and may not even have to be Senate-confirmed.<sup>94</sup>

## II. THE CONTEMPORARY CRITIQUE OF PRESIDENTIAL INVOLVEMENT AND THE INADEQUACY OF PREVIOUSLY ADVOCATED SOLUTIONS

As the president has become increasingly involved in agency decision making, the scholarly debate about presidential involvement has come to focus on two broad but well-defined critiques: one targeting accountability and the other targeting arbitrariness. This debate has provided useful clarification of the problems attending presidential involvement. However, it has not yet suggested any compelling means of resolving them. This Part outlines the terms of the contemporary debate with an emphasis on the inadequacies of previously articulated solutions. Sections II.A and II.B outline the accountability and arbitrariness critiques of presidential involvement. Section II.C discusses the previously articulated solutions to these critiques and argues that each is inadequate to address the problems they raise.

### A. *The Accountability Critique of Presidential Involvement*

According to the accountability critique, contemporary presidential involvement makes agencies less accountable to the public in their decision making.<sup>95</sup> As Part I explained, the presidential control model justifies intense presidential involvement by its supposed tendency to make agencies accountable to the president and, by proxy, to his national electorate.<sup>96</sup> Agency discretion is assumed acceptable so long as the public can see it and keep it in check, and the president, as a singularly visible and responsive actor, is thought to enable this process.<sup>97</sup> The accountability critique of presidential control posits the exact opposite—that agencies hide behind a veil of presidential privilege, that the president hides behind a bureaucratic web, and that both entities are less accountable to the public as a result.<sup>98</sup> There is considerable evidence that this theory is borne out in reality.<sup>99</sup>

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93. *Id.* at 701–02 (citing Exec. Order No. 13,422, 3 C.F.R. 191).

94. *Id.*

95. *See, e.g.,* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 78–84 (2006).

96. *See supra* notes 66–67 and accompanying text.

97. *See* Kagan, *supra* note 2, at 2331–32.

98. *See* Bressman & Vandenbergh, *supra* note 95, at 78–79.

99. *See id.* *But see* Croley, *supra* note 2; Sally Katzen, Correspondence, *A Reality Check on an Empirical Study: Comments on “Inside the Administrative State”*, 105 MICH. L. REV. 1497, 1502–06 (2007).

Presidents since Reagan have taken bold steps to make presidential involvement more variable and less transparent, and the judiciary has done little to counter them.<sup>100</sup> The above-referenced executive orders have expanded presidential authority and White House bureaucracy.<sup>101</sup> The expansion of presidential authority provides new means for presidential involvement, such as letter directives and signing statements.<sup>102</sup> The expansion of White House bureaucracy means that presidential involvement now issues through a number of White House offices in addition to issuing from OIRA or the president himself.<sup>103</sup> Different offices represent “the president” using different measures and routes, and this renders agency decision making more variable by increasing the range of outcomes that presidential involvement can theoretically promote.<sup>104</sup> The range of “presidential” actors also makes agency decision making less transparent because it prevents the public from immediately discerning whether the president, one of his subordinate offices, or the agency in question is primarily responsible for any given decision.<sup>105</sup> Since presidential involvement is not always included in the agency’s or the president’s record, moreover, the public cannot easily trace its occurrence after the fact.<sup>106</sup>

The variability and nontransparency of agency decision making leads directly to a decrease in agencies’ political accountability. Because presidential involvement is in fact exercised by a multitude of semi-autonomous White House entities, agencies are not always accountable to the president himself.<sup>107</sup> Because the public can neither see nor understand the rules of presidential involvement, it is unsure whether to hold the president, an agency, or some combination of the two accountable for any decision-making outcome.<sup>108</sup> And the likely result of all this—that the public will give the president credit when he claims it and blame agencies when

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100. For a recounting of presidents’ past efforts in this regard, see *supra* Section I.B.2. Courts, meanwhile, have traditionally given the president a wide berth in connection with his efforts to influence agency decision making, declining to set the bounds of acceptable involvement. *See, e.g.,* *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) (“Where the President himself is directly involved in oral communications with Executive Branch officials, Article II considerations—combined with the strictures of *Vermont Yankee*—require that courts tread with extraordinary caution in mandating disclosure beyond that already required by statute.”).

101. For an explanation of the expansion of presidential authority, see *supra* Section I.B.2. The expansion of White House bureaucracy is explained in Bressman & Vandenberg, *supra* note 95.

102. *See* Strauss, *supra* note 3, at 701–02, 720; Strauss, *supra* note 91, at 965–66.

103. Bressman & Vandenberg, *supra* note 95, at 66–67.

104. *See id.* at 93–94.

105. Lisa Schultz Bressman & Michael P. Vandenberg, Correspondence, *Legitimacy, Selectivity, and the Disunitary Executive: A Reply to Sally Katzen*, 105 MICH. L. REV. 1511, 1519–22 (2007); Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 464–65 (1979).

106. Bressman & Vandenberg, *supra* note 95, at 81.

107. *Id.* at 93–94.

108. *See* Strauss, *supra* note 91, at 965–67, 984.

not—is hardly reminiscent of the political-process accountability that the presidential control model envisions.<sup>109</sup>

The nonaccountability of agency decision making also has direct negative implications for the efficiency and fairness of agency rulemaking. Without a clear, rule-driven procedure for involvement, today's bureaucratized executive looks little like the unitary executive of theory, and presidential involvement is more likely to impede than to expedite agency decision making.<sup>110</sup> In the absence of public scrutiny, moreover, the president and his agencies have few incentives to follow majority opinion or to resist factious viewpoints. Indeed, the available evidence suggests that they do not.<sup>111</sup>

### B. *The Arbitrariness Critique of Presidential Involvement*

According to the arbitrariness critique, presidential involvement increases agencies' discretion and allows them to ignore their statutory criteria for decision making. As Part I explained, the presidential control model aims to assuage the accountability-based shortcomings of interest group representation.<sup>112</sup> But it remains vulnerable to the same arbitrariness problems that the transmission belt and expertise models grappled with and the IGR model largely ignored.<sup>113</sup> The presidential control model implicitly dispenses with these problems by assuming: (a) that presidential involvement provides substantive law for agencies to follow, i.e., that it is less arbitrary for the president to exercise "gap-filling" authority than it is for agencies to do so,<sup>114</sup> or (b) that presidential involvement will ensure agencies' compliance with congressional intent, i.e., that the president is willing and able to oil the "transmission belt."<sup>115</sup> Yet presidential gap filling is inherently more

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109. *Cf. id.* at 984 ("While, from a political perspective, one can applaud a President who goes out of his way to take responsibility as well as credit for the policy judgments of his administration, this seems a high price to pay.").

110. Bressman & Vandenberg, *supra* note 95, at 93 ("The multiplicity of voices through which presidential control speaks inhibits it from speaking authoritatively or effectively.").

111. Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006) (arguing that presidential involvement is systematically biased in favor of antiregulatory interests); Bressman & Vandenberg, *supra* note 95, at 86 ("EPA respondents indicated that the White House is more likely [than the EPA itself] to be captured by an interest group.").

112. *See supra* notes 66–67 and accompanying text.

113. *See supra* note 70 and accompanying text.

114. *See* Kagan, *supra* note 2, at 2336–37 (commenting on the president's "comparative advantage" over agencies); Strauss, *supra* note 91, at 981 ("We have not doubted that executive officials can be lawmakers, in the strongest sense, at least since 1905 . . .").

115. *See* Croley, *supra* note 2, at 861 (noting that the White House did not measurably exert more pressure for some interests than for others); Kagan, *supra* note 2, at 2361.

arbitrary than agency gap filling,<sup>116</sup> and the president lacks the institutional ability and motivation to make agencies follow congressional commands.<sup>117</sup>

The president's gap filling is inherently more arbitrary than an agency's because he has fewer institutional constraints. From a constitutional standpoint, the president and his agencies are equally constrained: neither has the ability to make law,<sup>118</sup> and while Congress may delegate gap-filling authority to either entity, the same "intelligible principle" criterion guides both forms of delegation.<sup>119</sup> However, from another perspective, the president is significantly less constrained. The past century of administrative practice has yielded a high number of judicial and statutory standards for agency gap filling.<sup>120</sup> These standards ensure that agency gap-filling processes resemble congressional lawmaking processes and that arbitrariness concerns are mitigated: the notice-and-comment process, like congressional lawmaking, is deliberative, is designed to protect minority concerns, and makes it relatively difficult for agencies to institute and overturn rules.<sup>121</sup> Notice-and-comment rulemaking also generates a more-or-less coherent record for judicial review.<sup>122</sup> The president's decision-making processes, by contrast, are more efficient than deliberative, are not designed to protect minority concerns, and are conducive to decisions that are relatively easy for the president to institute and overturn.<sup>123</sup> They are also considerably more difficult for courts to review.<sup>124</sup>

The president also lacks the institutional ability and motivation to make agencies follow congressional commands, and while courts are naturally suited to this role, the president's involvement prevents them from performing it. As Part I explained, the problem of administrative arbitrariness is defined by the lack of clear statutory commands and the ability of

116. See Yvette M. Barksdale, *The Presidency and Administrative Value Selection*, 42 AM. U. L. REV. 273, 309–26 (1993); Bressman, *supra* note 1, at 524–25; Stack, *supra* note 5, at 317–18.

117. See Barksdale, *supra* note 116, at 309–26.

118. See U.S. CONST. art. II.

119. Under the nondelegation doctrine, Congress may not delegate its legislative authority to outside entities. See BREYER ET AL., *supra* note 15, at 36–40. It may delegate "quasi-legislative" authority, however, and the bounds between these types of authority are defined by the presence or absence of "intelligible principles" that limit the delegate's discretion according to Congress's will (thus preserving the fiction that Congress has "legislated"). See *id.* The "intelligible principle" standard is the same whether Congress delegates authority to the president, an agency, some other entity, or some combination of entities. Compare *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737 (D.D.C. 1971) (approving a delegation from Congress to the president upon finding "intelligible principles"), with *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607 (1980) (approving a Congress-to-agency delegation on the same basis). But see Kagan, *supra* note 2, at 2369.

120. See *supra* notes 31–42 and accompanying text.

121. See Barksdale, *supra* note 116, at 309–26. If an agency seeks to revoke its own rules, it must dispense with the considerations on which it relied to recommend the rules in the first instance. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

122. See *supra* notes 31–42 and accompanying text (outlining the extensive procedures associated with paper hearings and arbitrary and capricious review).

123. See Barksdale, *supra* note 116, at 309–26.

124. See Bressman & Vandenberg, *supra* note 95, at 82–93.

administrative actors to circumvent them.<sup>125</sup> Presidential involvement is bound to aggravate this problem because the president's institutional motivations stem from the public's contemporary wants and needs, and because he is likely to act on them—regardless of their compliance with the delegating statute—to conserve political capital.<sup>126</sup> Even if the president were inclined to uphold statutory intent, his political incentives and lack of interpretive expertise would likely bias his efforts.<sup>127</sup> And his involvement in administrative decision making positively impedes courts from upholding statutory intent themselves. Given its legal training and relative isolation from the political process, the judiciary is uniquely positioned to interpret and uphold statutory intent.<sup>128</sup> However, because presidential involvement renders administrative decision making less transparent and less reviewable,<sup>129</sup> it hinders courts from performing this role. While courts might respond to these difficulties through tougher standards of review or adherence to existing standards,<sup>130</sup> their currently deferential position has had the opposite result—that of leaving the arbitrariness problems of presidential involvement unchecked.<sup>131</sup>

### C. *The Inadequacy of Previously Suggested Solutions*

The contemporary debate has usefully corralled the problems of presidential involvement under the headings of “accountability” and “arbitrariness.” However, as this Section demonstrates, the debate has not yet identified a workable solution to these problems. Instead, while attempting to impose meaningful limits on presidential involvement, scholars have missed the mark by either addressing one critique at the expense of the other or by failing in terms of precision and practicality.

Elena Kagan initiated the modern debate about presidential involvement, in effect, with her 2001 article *Presidential Administration*.<sup>132</sup> Writing before today's accountability and arbitrariness critiques had fully crystallized, Kagan largely accepted the assumptions of the presidential control model<sup>133</sup> and sought to maximize agencies' accountability by increasing their visibility to the president's national electorate.<sup>134</sup> She thus left crucial aspects of the

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125. See *supra* note 100 and accompanying text.

126. The president is theoretically motivated by his national electorate, whose interests may or may not correspond with those represented by the current statutory framework. See Kagan, *supra* note 2, at 2335.

127. See Bressman, *supra* note 1, at 506.

128. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

129. See Bressman & Vandenberg, *supra* note 95, at 82.

130. And that is precisely what this Note recommends. See *infra* Section III.A.

131. See *infra* Section III.B; *supra* note 100 and accompanying text.

132. Kagan, *supra* note 2.

133. See Bressman, *supra* note 1, at 503.

134. Kagan, *supra* note 2, at 2363–85.

arbitrariness critique unaddressed,<sup>135</sup> and her efforts to improve accountability also proved impractical in retrospect. To increase agencies' and the president's accountability, Kagan suggested that courts should hinge *Chevron* deference on evidence of presidential involvement<sup>136</sup>: that they should only allow deference where the president is involved in the decision under review.<sup>137</sup> Kagan astutely predicted that the prospect of losing *Chevron* deference would give agencies and presidents an incentive to highlight the channels and means of presidential involvement, increasing their accountability to courts and the public as such.<sup>138</sup>

However, Kagan surely exaggerated the strength of this incentive. After all, a denial of *Chevron* deference is not the same as a reversal,<sup>139</sup> and a president involved in controversial decisions might take the risk of affirmation sans *Chevron* before exposing his involvement. Kagan also overstated the degree to which highlighting involvement is akin to promoting accountability. In her scheme, the president need only signal his involvement to obtain *Chevron* deference.<sup>140</sup> However, as the above discussion has shown, the president has a plethora of smoke-screening tactics to make the details

135. Bressman, *supra* note 1, at 503–04.

136. *Chevron* requires courts to conduct a two-step inquiry when reviewing agency interpretations of law. First, the court must determine whether the agency-interpreted language is “clear” or not. If the court determines that the language is clear, then its subsequent review consists of determining whether the agency’s interpretation comports with this clear meaning and overturning the agency’s interpretation if it does not. If the court determines that the language is not clear, then it determines whether the agency’s interpretation is “reasonable” and overturns the agency’s interpretation if it is not. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–44 (1984). Subsequent decisions have also added a “step zero” to the *Chevron* inquiry by requiring courts to ask whether particular forms of agency interpretation are *ever* eligible for *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

137. Kagan, *supra* note 2, at 2380.

138. *Id.* at 2372 (explaining how courts should coax the president into transparency).

139. *Chevron* deference only entitles an agency to escape judicial second-guessing when Congress has not clearly spoken on the correct interpretation of a law and the agency presents a reasonable alternative. *Chevron*, 467 U.S. at 842–43. If *Chevron* deference were denied, as in the above hypothetical, the reviewing court would make an independent legal interpretation and weigh the agency’s against its own. *See id.* at 845. The agency might still receive a lesser form of interpretive deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating, forty years prior to *Chevron*, that judicial deference should “depend upon the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (explaining that when *Chevron* deference is inapplicable, certain agency decisions are still “entitled to respect” under *Skidmore*).

140. Kagan, *supra* note 2, at 2380. Kagan does not specify how the president should signal his involvement or how the courts should go about discerning it. She hints, though, at the difficulties that the president and judiciary would face in administering her solution:

The President and his immediate staff cannot offer input, much less direction, on all or even most interpretations of law reached by executive departments. Conversely, the President and his staff might participate extensively in the occasional legal interpretation offered by an independent commission. Given these realities, courts could apply *Chevron* when, but only when, presidential involvement rises to a certain level of substantiality, as manifested in executive orders and directives, rulemaking records, and other objective indicia of decisionmaking processes.

*Id.* at 2377.

of his involvement unclear.<sup>141</sup> This is problematic because agencies remain unaccountable so long as we cannot see how or why they made the decisions they did.<sup>142</sup> The president can claim credit or not, regardless of his actual input.<sup>143</sup> And while agencies might themselves have incentives to reveal the details of involvement, they are not always aware of the channels and means through which the president is involved.<sup>144</sup>

As the author of the modern arbitrariness critique, Lisa Bressman took aim at Kagan's emphasis on accountability while suggesting new ways to address the problem of arbitrariness.<sup>145</sup> In her 2003 article *Beyond Accountability*, Bressman suggested that the best solution to the arbitrariness critique was for agencies to elaborate their own decision-making criteria on top of those provided by Congress.<sup>146</sup> According to her, the creation of these additional constraints would limit agency discretion both in law and in fact by clarifying the bounds of appropriate agency behavior and helping courts to discern them.<sup>147</sup>

Yet Bressman's solution to the arbitrariness critique is insufficient. It ignores the fact that agencies, like the president, are an improper substitute for Congress.<sup>148</sup> While agencies are categorically better than the president at statutory gap filling,<sup>149</sup> Congress retains sole authority to make positive law in all instances.<sup>150</sup> Bressman's approach ignores this fact by letting agencies define their own "intelligible principles" when the existence of such principles is a prerequisite for agency action.<sup>151</sup> It is also impractical: first, because the Supreme Court has effectively vetoed it;<sup>152</sup> and second, because it does not suggest a means by which courts should *monitor* presidential involvement in agency-created regimes. This is problematic because the president is

141. See *supra* Section II.A. The above discussion dealt with the confusion caused *involuntarily* by the variability and nontransparency of presidential involvement. But the president could easily use this confusion to his advantage if he wanted to make the details of his involvement unclear. See also Bressman & Vandenberg, *supra* note 95, at 69.

142. In this respect, recall the reasoning behind arbitrary and capricious review—that the *form* of deliberation matters in addition to its results (i.e. that relevant factors are the only ones that agencies may consider). See *supra* notes 37–42.

143. See *supra* notes 108–109 and accompanying text.

144. Bressman & Vandenberg, *supra* note 95, at 93 (“[T]he agency has difficulty assessing and following administration policy.”).

145. Bressman, *supra* note 1.

146. *Id.* at 532–33.

147. *Id.*

148. See *supra* notes 118–119 and accompanying text.

149. See Barksdale, *supra* note 116, at 306–07; see also *supra* notes 120–124 and accompanying text.

150. Barksdale, *supra* note 116, at 304.

151. See *supra* note 119.

152. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001) (preventing an agency from providing its own “intelligible principle” and clarifying that “the [agency’s] prescription of the standard that Congress had omitted . . . would *itself* be an exercise of the forbidden legislative authority”).

likely to shape agency-created standards<sup>153</sup> and because the arbitrariness of agency decision making is largely due to the nature of presidential involvement, rather than the lack of decision-making criteria.<sup>154</sup>

Writing in 2006, Kevin Stack addressed the arbitrariness critique of presidential involvement<sup>155</sup> with partially satisfying results. Stack discredited the unitary-executive-based theory that, to be constitutional, the directive authority contained in Congress-to-agency delegations must “run” to the president, allowing him to stand in for the agency.<sup>156</sup> As Stack showed, the Constitution permits Congress to delegate directive power to nonpresidential entities such as agencies.<sup>157</sup> In practice, moreover, Congress only intends to give the president directive authority in a limited number of cases, i.e., those where it explicitly delegates directive authority to him.<sup>158</sup> Based on this showing, Stack concluded that the president’s case-level directives were only legally binding in these limited instances, and that, as a formal matter, presidential involvement should impose fewer constraints on agency decision making than is commonly supposed.<sup>159</sup>

Like Bressman, however, Stack failed to elucidate how courts, Congress, or both should proceed with the task of loosening these constraints and reversing modern trends.<sup>160</sup> By assuming that his assertion of illegality was enough, Stack exaggerated the ability and incentives of agencies to resist presidential involvement. The president has plentiful means of levying pressure on agencies,<sup>161</sup> and he appoints agency heads that he believes will yield.<sup>162</sup> An outside adjudicator is intuitively necessary to enable agency resistance and curb the impact of presidential involvement.

More recently, Michele Gilman suggested that courts should use the famous typology from *Youngstown Sheet & Tube Co. v. Sawyer* to evaluate

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153. This follows directly from the fact that modern presidents are heavily involved in agency decision making.

154. See Bressman & Vandenberg, *supra* note 95, at 76–78.

155. Stack, *supra* note 5.

156. For an overview of the unitary-executive theory, see *Myers v. United States*, 272 U.S. 52, 135 (1926) (“[T]he President . . . may properly supervise and guide [executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”). For a summary of the theory that agency authority “runs” to the president, see Stack, *supra* note 5, at 266 (“[D]efenders of a strongly ‘unitary’ executive argue that the Constitution requires that all executive power be vested in the President, and therefore that any agency action should be subject to presidential revision.”).

157. See Stack, *supra* note 5, at 296–304.

158. *Id.* at 278–81.

159. See *id.* at 313–16.

160. Stack suggests that courts should ask whether authority runs to the president in each case and then apply or withhold *Chevron* deference accordingly. *Id.* at 293. Yet, like Kagan, he fails to inquire about the *content* of presidential involvement, which may still render an agency’s decision arbitrary and capricious even if *Chevron*’s criteria are satisfied. See *infra* Section III.A.

161. See *supra* Section I.B.2.

162. See Strauss, *supra* note 3, at 736.

instances of presidential involvement.<sup>163</sup> Gilman's 2007 article built on Stack's basic insight—that Congress-to-agency delegations do not always give the president directive authority—and it articulated a host of follow-up questions, based on *Youngstown*, to ask when congressional delegations do *not* provide the president with directive authority. Among the most pressing of these questions are the following:

1. Does the president have outside statutory authority?<sup>164</sup>
2. Has Congress expressly prohibited the president from exercising the authority in question?<sup>165</sup>
3. Are there explicit or implicit constitutional concerns for or against the president's exercise of authority?<sup>166</sup>

This framework presents a coherent and time-tested means of reviewing presidential involvement, and I anticipate that it should be used in conjunction with my Part IV recommendations.<sup>167</sup> However, its weaknesses should still prevent it from being the predominant check on presidential involvement. Recent Supreme Court opinions show an increased willingness to read *Youngstown* in the president's favor.<sup>168</sup> Also, *Youngstown* leaves room for the president to "adversely possess" authority where Congress has not explicitly said "no."<sup>169</sup> Such reliance on congressional-presidential dialogue is unrealistic given that Congress lacks the incentives and ability to monitor individual instances of presidential power grabbing.<sup>170</sup> The president is more

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163. Gilman, *supra* note 3, at 1133. Writing in concurrence in *Youngstown*, Justice Jackson described three categories of presidential action. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). According to him, the president has the most power when acting pursuant to Congress's express or implied intentions and the least authority when acting against Congress's intentions (in such instances, his actions are only lawful if they are supported by an exclusive constitutional grant). When Congress has not spoken, the president acts in a "zone of twilight": he "can only rely upon his own independent powers," but his real authority "is likely to depend on the imperatives of events and contemporary imponderables." *Id.* at 637.

164. *See* Gilman, *supra* note 3, at 1128.

165. *See id.* at 1133.

166. *See id.* at 1146.

167. Gilman's approach is still clearly necessary in situations, like the ones addressed in her article, where the president is able to devise an executive order that is "essentially self-executing" and obviates his need to influence or commandeer agency decision making. *See id.* at 1144–45. Such cases do not implicate "presidential involvement" within the meaning of this Note and do not allow for the application of arbitrary and capricious review. *See supra* note 10 and accompanying text.

168. Since the Court decided *Youngstown*, it has become decidedly more willing to view constitutional and statutory language flexibly in favor of the president. *Compare Youngstown*, 343 U.S. 579 (finding that Congress implicitly forbade presidential action), with *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding that Congress had implicitly authorized presidential action under conditions similar to those in *Youngstown*); *see also* Strauss, *supra* note 3, at 699–700.

169. *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President . . .").

170. Stack, *supra* note 5, at 320.

capable of speedy action than Congress by design,<sup>171</sup> and the judiciary is better positioned to identify and curb his constitutional excesses.<sup>172</sup>

Aside from being one sided and impractical, the above solutions share another common fault: with the partial exception of Kagan's solution, they rely primarily on nonjudicial actors to keep presidential involvement in check. For Stack and Bressman, agencies are supposed to define and uphold their own limits.<sup>173</sup> For Gilman, Congress performs this function by preempting or reacting to the president's specific exercises of authority.<sup>174</sup> And while Kagan instructs the courts to condition *Chevron* deference, she assumes that agencies and the president will signal to courts how and when to do so.<sup>175</sup> These and other authors have acknowledged the importance of judicial review,<sup>176</sup> and at least one commentator has applied arbitrary and capricious review to a concrete instance of presidential involvement.<sup>177</sup> But none has yet provided a comprehensive system for judicial review in all cases of presidential involvement. Such a system is necessary because of the difficulty of monitoring agency decision making in the face of presidential involvement,<sup>178</sup> the judiciary's current reluctance to review agency decision making in instances of presidential involvement,<sup>179</sup> and the judiciary's unique ability to monitor and limit presidential involvement.<sup>180</sup>

### III. ARBITRARY AND CAPRICIOUS REVIEW AS A MEANS OF LIMITING PRESIDENTIAL ADMINISTRATION

Arbitrary and capricious review presents courts with a workable but unexplored means of limiting presidential involvement and of accomplishing what previously suggested solutions have not: a coherent response to the accountability and arbitrariness critiques. This Part undertakes to outline how courts should apply arbitrary and capricious review more effectively to scrutinize agency decisions in cases of presidential involvement. Section

171. See THE FEDERALIST NO. 70, at 375 (Alexander Hamilton) (J.R. Pole ed., 2005) ("Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number . . .").

172. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

173. See *supra* text accompanying notes 146 and 159.

174. See Gilman, *supra* note 3, at 1127–28.

175. Kagan, *supra* note 2, at 2380.

176. See, e.g., *id.* (suggesting that courts should "relax" the traditional scrutiny of arbitrary and capricious review where the president is involved in administrative decision making).

177. B.J. Sanford, Note, *Midnight Regulations, Judicial Review, and the Formal Limits of Presidential Rulemaking*, 78 N.Y.U. L. REV. 782 (2003). Sanford's note anticipates my argument in Part III to some degree by applying arbitrary and capricious review to a single instance of presidential involvement. *Id.* at 801–03. It stops short, however, of suggesting the general, bifurcated framework that I elaborate there.

178. See Bressman & Vandenberg, *supra* note 95, at 82–93.

179. See *infra* Section III.B; *supra* note 100 and accompanying text.

180. See *supra* notes 128 and 172 and accompanying text.

III.A provides a model for the application of arbitrary and capricious review across situations of presidential involvement. Section III.B discusses the existing obstacles to arbitrary and capricious review and highlights the possibility of its meaningful application in light of such obstacles. Section III.C demonstrates that arbitrary and capricious review is a better solution to the accountability and arbitrariness critiques of presidential involvement than those suggested in the existing literature.

*A. A Model for the Application of Arbitrary and Capricious Review  
in Situations of Presidential Involvement*

Arbitrary and capricious review provides courts with a straightforward system for reviewing agency decisions that are subject to presidential involvement. In such cases, the judiciary should first determine whether Congress delegated directive authority to the agency or to the president. The catalogue of “relevant factors” and the course of review should depend on the holder of directive authority. And while the level of scrutiny should be stringent in both instances, it should be more stringent where the agency, rather than the president, is the holder of authority.

In reviewing a decision that has been subject to presidential involvement, the court should first use ordinary principles of statutory interpretation to determine whether the agency or president holds directive authority. As the above discussion has shown, despite courts’ demonstrated propensity to allow aggressive presidential involvement, Congress does not typically intend for the president to have directive authority.<sup>181</sup> The agency is the presumptive holder of directive authority, and this presumption is only overcome when Congress explicitly says otherwise. This convention draws support both from constitutional considerations<sup>182</sup> and from other areas of the law.<sup>183</sup>

*1. Where the Agency Holds Directive Authority*

The court should base its relevant-factor inquiry on the identity of the authority holder, and the course of this inquiry should be particularly stringent where the agency, rather than the president, holds directive authority. A Congress-to-agency delegation implies that the president’s directives are nonbinding—that the agency need not heed them in making its decisions.<sup>184</sup> But on top of that, it dictates that the agency *must* not heed such directives. And indeed, the president must refrain from even expressing case-level

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181. See Stack, *supra* note 5, at 276–99.

182. See *id.*

183. See Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511 (explaining that *Chevron* proceeds from an assumption that Congress meant to grant agencies interpretive authority in cases where it used ambiguous language).

184. Stack, *supra* note 5, at 313–14.

*opinions* because Congress-to-agency delegations imply that the president's case-level opinions are themselves irrelevant factors.<sup>185</sup>

The president's case-level opinions are irrelevant because when Congress delegates to an agency, it aims to benefit from that agency's unique institutional advantages—to address a set of problems with expert, nonpolitical decision making.<sup>186</sup> But presidential opinions prevent agencies from using these advantages. Even when the president bases his case-level opinion on relevant factors, he substitutes his own judgment for the agency's, weighing the relevant factors himself. This is problematic because Congress has indicated that the agency is uniquely capable of rendering judgment, which necessarily means the opinions of outside people or entities are irrelevant and must not receive consideration.<sup>187</sup> Since the agency is unduly likely to incorporate all or part of the president's opinion into its own,<sup>188</sup> courts must assume the agency has considered this irrelevant factor if it is present. If the president expresses case-level opinions in a context of agency authority, then the agency's decision is inherently arbitrary and capricious.<sup>189</sup>

The irrelevance of the president's case-level opinions requires reviewing courts to conduct a searching review to identify the expression of any such opinions. It is not enough for courts to flag explicit presidential directives. Rather, since presidential involvement takes place on a multitude of institutional and psychological levels,<sup>190</sup> courts must also search for more nuanced expressions of case-level opinion. Direct communications between the president and the agency are the most obvious place where such opinions could appear, and courts should take great care to include them in the record for review, regardless of whether the agency has included them in its

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185. See *supra* notes 37–42, 181–183 and accompanying text; *infra* notes 227–231 and accompanying text.

186. See *infra* notes 227–231 and accompanying text. Although Part I noted the flaws of the “expertise” model, that discussion should not be read to debunk the instant proposition that agencies are expert decision makers in design and in fact. See *infra*, notes 227–231 and accompanying text. The “expertise” model merely exaggerated the benefits of expertise—objectivity and technical know-how—to obscure the problem of arbitrariness. See *supra* Section I.B.1.

187. See *supra* note 185.

188. See *supra* notes 161–162 and accompanying text.

189. At first glance, this application of arbitrary and capricious review might seem to give the president opportunities for stalling the promulgation of disfavored rules—if an agency was poised to finalize a rule that the president disfavored, it seems, he could purposefully and visibly express an opinion, rendering the proposed rule arbitrary and capricious. See *supra* text accompanying note 109. But a number of considerations urge that such stalling should not occur. First, the president has authority to remove agency heads. See *supra* note 72. His primary incentive to use subtler forms of influence is to avoid the negative publicity that attends visible removal decisions. Stack, *supra* note 5, at 295. But stalling is just as visible as removal once flagged by the courts, and the application of arbitrary and capricious review curbs subtler forms of influence by increasing judicial scrutiny. See *supra* notes 181–183 and accompanying text. Second, since the president appoints agency heads in the first instance, it is likely that they will share his political convictions, so it is unlikely that he will need (or want) to stall. See *supra* note 162 and accompanying text.

190. See Bressman & Vandenberg, *supra* note 95, at 66–67.

decision-making record.<sup>191</sup> Aside from direct communications, however, the president's executive orders, "take care" directives, and public statements are also inherently suspect.<sup>192</sup> Courts should examine these documents for tacit or explicit presidential expressions about pending or upcoming agency decisions. If courts find evidence of such presidential involvement, they should deem such opinions irrelevant and presume that the agency considered them.<sup>193</sup>

## 2. Where the President Holds Directive Authority

Arbitrary and capricious review should be less stringent where Congress has delegated directive authority to the president. Yet it should still require a more "substantial inquiry"<sup>194</sup> than courts currently apply. The first and most important implication of a delegation that runs to the president is that the president may direct an agency how to decide individual cases: presidential opinion is itself a relevant factor that the agency must consider wherever it exists.<sup>195</sup> Since *Franklin v. Massachusetts* dictates that the president is not an agency, the court may not directly scrutinize the content of presidential opinions for relevant-factor compliance.<sup>196</sup> But the nondelegation doctrine still urges a direct inquiry, as noted in Part II.<sup>197</sup> With regard to the president's direct actions, the court must ask whether Congress provided "intelligible principles" and whether the president abided by them in rendering case-level decisions.<sup>198</sup> Also, the court must still apply arbitrary and capricious review to the *agency's* decision. Directive authority is different from independent authority, after all, and when Congress allows the president to direct an agency (rather than allowing him to act alone), he is still indirectly subject to the limitations of agency action.<sup>199</sup> Agency heads

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191. A reviewing court should be able to determine whether such communications took place, regardless of whether they appear on the provided record, by interviewing agency heads. Agency heads will likely reveal any such communications in order to preserve their institutional autonomy and to avoid perjuring themselves. The reservations expressed in note 144 and its accompanying text are not necessarily dispositive in this regard because a reviewing court need only look for the *fact* of presidential involvement; it need not discern the specific White House entity or office administering the president's policy.

192. See *supra* Section I.B.2 (explaining how presidents have used these tactics to influence agency decisions).

193. Kagan suggests that courts should conduct a similar search for evidence of presidential involvement. See Kagan, *supra* note 2, at 2377. However, while her approach instructs courts to conduct an imprecise balancing test to determine the substantiality of presidential involvement, see *supra* note 140, this Note's approach to arbitrary and capricious review instructs courts to look solely for the *fact* that the president opined when the agency holds directive authority.

194. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

195. See *supra* notes 37–42, 181–183 and accompanying text; *infra* notes 227–231 and accompanying text.

196. See *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

197. See *supra* note 119.

198. See *supra* note 119.

199. See Stack, *supra* note 5, at 278–93.

implement the president's directives in these contexts, and they are subject to arbitrary and capricious review in doing so.<sup>200</sup> As a presumptively considered factor, the president's opinion is a necessary item for inclusion on the record for review.<sup>201</sup> And if the content of presidential opinion veers from Congress's relevance criteria (insofar as the agency has considered and applied it), then the court must overturn the agency's decision.<sup>202</sup> While the agency must consider the president's opinion, the agency's independent statutory constraints dictate that it cannot always legally implement it.

To ensure accountability and nonarbitrariness, arbitrary and capricious review should still require intense scrutiny of agency decisions where the president has directive authority. While the president's case-level opinions are not themselves irrelevant in such cases, their agency-considered content must not involve the weighing of irrelevant factors.<sup>203</sup> And the same factors that urge aggressive review in situations of agency authority urge it here as well.<sup>204</sup> Presidential involvement is still an "extremely compelling circumstance."<sup>205</sup> And while the need for "executive privilege" á la *Sierra Club v. Costle* has at least some resonance in situations of presidential authority, it is still relatively minimal in the informal contexts where presidential involvement usually occurs.<sup>206</sup> It should not serve to lighten the scrutiny of arbitrary and capricious review.

#### B. *Overcoming Obstacles to the Application of Arbitrary and Capricious Review in Situations of Presidential Involvement*

Courts have erected many obstacles to arbitrary and capricious review in cases of presidential involvement, and my model seems admittedly impractical on first glance. However, a closer inspection reveals that these obstacles are all either groundless or minimal enough to preserve the

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200. This much is clear from the language of the APA. 5 U.S.C. § 706 (2006).

201. *Cf. Sierra Club v. Costle*, 657 F.2d 298, 406–07 (1981) (suggesting that presidential involvement should be docketed in circumstances raising a presumption that the agency or the president acted improperly).

202. *Cf. id.*

203. *See supra* notes 36–42 and accompanying text.

204. These factors include the likelihood that the president will consider irrelevant factors, the difficulty of tracking his involvement, and the infrequency of his intensive involvement, all of which have been mentioned above.

205. *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978).

206. The *Sierra Club* court relied on *United States v. Nixon* in expounding the need for "executive privilege." *Sierra Club v. Costle*, 657 F.2d 298, 406 (D.C. Cir. 1981). In *Nixon*, the Supreme Court instructed that the president's ability to communicate confidentially with his staff "[was] fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). Yet this need is clearly reduced in situations of informal rulemaking. *See infra* note 216 and accompanying text. An agency head is not as clearly a member of the president's staff as other government employees are. *See infra* note 229. Also, the informal rulemaking process—designed to foster transparent, democratic participation by interested parties—is unlike those contexts where the Supreme Court typically upholds executive privilege. *See infra* notes 215–216 and accompanying text.

opportunity for meaningful review. Arbitrary and capricious review is both technically applicable and properly applied in all cases of presidential involvement.

The first obstacle to arbitrary and capricious review comes from *Franklin v. Massachusetts*, where the Supreme Court ruled that the president is not an agency and that, as such, he is immune from all APA-anticipated standards of review, arbitrary and capricious review included.<sup>207</sup> However, *Franklin* does nothing to prevent courts from checking an agency's record for presidential involvement; it merely exempts the president from *direct* APA review.<sup>208</sup> It is consistent with *Franklin* for a court to inquire about presidential involvement while scrutinizing an agency's decision-making record, and this Note proposes nothing more.

A second, more significant obstacle to arbitrary and capricious review comes from *Sierra Club v. Costle*, where the U.S. Court of Appeals for the D.C. Circuit placed the burden on plaintiffs to prove that unrecorded presidential involvement had caused the agency to consider irrelevant factors.<sup>209</sup> This ruling makes it difficult to apply arbitrary and capricious review in cases of unrecorded presidential involvement.<sup>210</sup> However, *Sierra Club* actually supports the standard's use as a general matter—the court noted that the decision whether or not to docket presidential involvement for relevant-factor analysis requires a case-by-case judicial analysis.<sup>211</sup> Also, there is reason to believe that *Sierra Club*'s impact has eroded with time. In the twenty-six years since the case was decided, it has garnered little judicial support. At the same time presidential involvement has expanded considerably.<sup>212</sup> Given the modern president's intensive and explicit involvement in agency decision making, it is now presumably easier for plaintiffs to demonstrate that a president has caused an agency to consider irrelevant factors. The expansion of presidential involvement also leaves fewer reasons to prioritize executive privilege over judicial review as a baseline matter. At the time *Sierra Club* was decided, the president was just starting to become involved in

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207. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

208. *See id.*

209. *Sierra Club v. Costle*, 657 F.2d 298, 405–07 (1981). In the court's logic, "executive privilege" gave the president presumptive immunity; confidential communications were more important than the interests served by arbitrary and capricious review. *Id.*

210. Throughout this Note, I have asserted that presidential involvement is often unrecorded (or at least that it is in theory). *Sierra Club* makes it harder to review presidential involvement because of this fact, i.e., because plaintiffs have the burden to show presidential involvement but they presumably lack the resources or the power to determine its unrecorded substance. Yet arbitrary and capricious review would still be useful for monitoring presidential involvement even if I am incorrect in my assertion that *Sierra Club* is outdated and/or incorrect as a matter of law. In cases where the agency held directive authority, plaintiffs would only have to show the fact of presidential involvement, i.e., the fact of involvement would itself prove consideration of irrelevant factors. *See supra* notes 185–189 and accompanying text. In cases where the president held directive authority, the plaintiffs could still rely on executive orders and other public documents to show the president's irrelevant intent. *See supra* notes 203–206 and accompanying text.

211. *Sierra Club*, 657 F.2d at 406–07.

212. *See supra* Section I.B.2.

administrative decision making; the dangers of presidential involvement were as yet unknown.<sup>213</sup> Today's public and courts are presumably more likely to see confidentiality as an opportunity for abuse and the purposes of arbitrary and capricious review as comparatively important.<sup>214</sup> The case for executive privilege is also relatively weak in the context of informal rule-making, which is meant to promote careful, open deliberation.<sup>215</sup> The cases where courts recognize executive privilege typically involve a much clearer need for secrecy or expediency.<sup>216</sup>

Lastly, *Sierra Club* is outdated because it implicitly buys into the incorrect presumptions that the contemporary debate has debunked. By lightening its scrutiny, prioritizing executive privilege, and presuming that an incomplete agency-provided record was accurate,<sup>217</sup> the court misunderstood the president's significance for relevant-factor analysis. It implicitly assumed (a) that unrecorded presidential input was limited to a discussion of relevant factors addressed in the agency-provided record; or (b) that the agency did not consider any irrelevant factors implicated by presidential input. The discussion in Parts I and II shows the fallacy of these assumptions. The president's institutional interests should motivate him to provide irrelevant input,<sup>218</sup> and his positional authority increases the likelihood that agencies will consider it.<sup>219</sup>

Ultimately, insofar as Congress intends an agency delegation to foster independent thinking and intrabranch disagreement, the president's opinion is itself an irrelevant factor. Even if based wholly on relevant factors, the president's opinion represents a weighing of interests that the agency was meant to conduct;<sup>220</sup> and an agency's expertise is less operative once tainted by the authority of presidential opinion.<sup>221</sup> Together with the issues addressed in Part II, these considerations caution that greater, not less, scrutiny is appropriate in instances of presidential involvement. While

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213. See *supra* Section I.B.2.

214. Cf. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (linking a historical decline in voter turnout and trust in government to a more general erosion of America's social networks).

215. See *supra* notes 31–34 and accompanying text (describing paper-hearing procedures).

216. See Ronald L. Claveloux, Note, *The Conflict Between Executive Privilege and Congressional Oversight: The Gorsuch Controversy*, 1983 DUKE L.J. 1333, 1346 (explaining that executive privilege arises in three distinct situations: those involving "military or diplomatic secrets"; those where executive privilege is necessary to protect government informants; and those dealing with "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated").

217. See *Sierra Club v. Costle*, 657 F.2d 298, 404–05 (D.C. Cir. 1981).

218. See *supra* note 126.

219. This is true both because presidential involvement operates on many institutional and psychological levels, see Bressman & Vandenberg, *supra* note 95, at 65–67, and because the president can fire agency heads or obstruct their conduct using other means, see *supra* notes 72, 141 and accompanying text.

220. See *infra* notes 229–231 and accompanying text.

221. See *infra* notes 229–231 and accompanying text.

agency-provided records supply an adequate basis for relevant-factor analysis in most cases, courts should inquire further when the circumstances require.<sup>222</sup> Because presidential involvement increases the risk that agencies will consider irrelevant factors, it represents an “extremely compelling” circumstance of the kind identified in *Vermont Yankee*.<sup>223</sup> As such, presidential involvement calls for additional procedural scrutiny.

The scholarly debate about presidential involvement suggests two additional obstacles to arbitrary and capricious review, both of which are easily overcome. First is the judicial presumption that presidents have constitutional authority to direct agencies’ case decisions. By turning a blind eye to letter directives, signing statements, and other aggressive measures,<sup>224</sup> the judiciary implies that the president has case-level directive authority. Yet the Constitution does not explicitly provide such authority,<sup>225</sup> and interpreting the Constitution to allow it is a self-defeating proposition. If the president directs case decisions without statutory authorization, then he ignores Supreme Court precedent establishing the “intelligible principle” rule—the satisfaction of which is necessary to render case decisions appropriate under the nondelegation doctrine.<sup>226</sup>

Second is the judicial presumption that Congress-to-agency delegations run to the president—that the president has *statutory* grounds for directive authority in each case. Courts have implicitly relied on this theory in cases like *Sierra Club* and in declining to exercise arbitrary and capricious review in situations of presidential involvement. Yet the weight of available evidence discourages this approach. Congress is typically explicit when it delegates authority to the president: it cannot be assumed to delegate to him whenever it delegates to an agency.<sup>227</sup> While an agency’s directive authority may limit presidential discretion, such limitations are not inconsistent with the idea of a unitary executive.<sup>228</sup> The Framers intended to foster intrabran-

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222. See *supra* notes 34–35 and accompanying text.

223. See *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 543 (1978) (noting that the development of an agency’s decision-making record is warranted in “extremely compelling circumstances”).

224. See *supra* note 100.

225. See *supra* notes 71–77 and accompanying text.

226. As Part II noted, nonlegislative entities lack lawmaking authority and may only exercise delegated congressional authority when Congress provides “intelligible principles” for them to abide by. See *supra* note 119 and accompanying text. Interpreting the Constitution to allow the president directive authority is equivalent to granting him independent lawmaking authority (which he patently does not have). Such an interpretation would allow the president to ignore the “intelligible principles” rule, which presumes that his authority is statutory.

227. Stack, *supra* note 5, at 276–99. Proponents of a strict unitary executive may object that regardless of what Congress aims at, it can only hit the president; that he *is* the executive branch. But the fact that the Framers anticipated intrabran-branch disagreement discourages this view. See *infra* note 229.

228. See Strauss, *supra* note 3, at 709 (providing an interpretation of *Myers v. United States*, 272 U.S. 52 (1926), and the unitary-executive theory more generally).

disagreement,<sup>229</sup> and this works to ensure that important decisions involve a modicum of debate and deliberation.<sup>230</sup> It also makes intuitive sense that Congress should determine the recipients of its delegated authority since specific problems call for specific competencies and such authority is not always executive in nature.<sup>231</sup> The president remains a unitary executive, despite these encroachments, because he can trump an agency's directive authority at any time using his constitutionally anticipated appointment and removal powers.<sup>232</sup>

*C. Arbitrary and Capricious Review as a Solution to the Accountability and Arbitrariness Critiques of Presidential Involvement*

The obstacles to the application of arbitrary and capricious review are, then, surmountable. And my model provides a more tailored and effective solution to the accountability and arbitrariness critiques of presidential involvement than those previously suggested. Arbitrary and capricious review is more tailored than other solutions because courts developed it to police the informal rulemaking contexts where presidential involvement usually takes place. It is also more effective at addressing the accountability and arbitrariness critiques of presidential involvement. Arbitrary and capricious review addresses the accountability critique (a) by overcoming current obstacles to judicial review, both real and imagined, and (b) by intensifying the level of review beyond that which courts and scholars have previously deemed appropriate. It addresses the arbitrariness critique by performing these functions and by placing the issue of arbitrariness at the center of the reviewing court's inquiry.

A solution based on arbitrary and capricious review is well tailored to the contexts in which presidential involvement typically takes place. As Part I discussed, courts developed modern arbitrary and capricious review to police informal agency decision making—the kind of decision making in which the president is most often involved.<sup>233</sup> Other judicial standards are not as well tailored for monitoring presidential involvement. While *Chevron* review requires a similar analysis—whether Congress clearly indicated the meaning of statutory language, and if not, whether the agency's interpretation is reasonable<sup>234</sup>—it speaks to a slightly different issue and is more

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229. *Id.* at 737–38 (“In domestic government, the Constitution is explicit that Congress may create duties for heads of departments . . . . Unlike army generals, who may be commanded, the heads of departments the President appoints and the Senate confirms have the responsibility to decide the issues Congress has committed to their care . . . and not simply to obey.”).

230. *See* Stack, *supra* note 5, at 310–22.

231. *See* *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935).

232. *See supra* note 72.

233. *See supra* notes 26–29 and accompanying text.

234. *See* *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 845 (1984); *supra* note 136.

concerned with substance than procedure.<sup>235</sup> An agency's decision could fall within the realm of reasonable interpretation while still relying on irrelevant (and thus arbitrary and impermissible) factors. While *Youngstown* review is explicitly concerned with arbitrariness, moreover, it is difficult to apply because Congress is relatively incapable of speedy action<sup>236</sup> and because the Supreme Court has developed an explicitly permissive stance in recent years.<sup>237</sup> *Youngstown* review is also problematic because it asks whether presidential involvement is appropriate *at all*, rather than attempting to impose realistic limits.<sup>238</sup> Unlike these insufficient approaches, arbitrary and capricious review requires courts' involvement at the micro level. Arbitrary and capricious review forces courts both to scrutinize agencies' decision-making processes in the appropriate amount of detail and to recognize the inevitability of presidential involvement while drawing a statutorily defined line between appropriate and inappropriate input.<sup>239</sup>

My model is also more effective at addressing critiques of presidential involvement. It addresses the accountability critique, first of all, by debunking false assumptions about the nature of presidential involvement and intensifying judicial scrutiny in the contexts where it is present. The advocates of other solutions have not given similar consideration to the assumptions underlying the currently high level of presidential involvement and have often proceeded in the shadow of such assumptions. Kagan has wrongly assumed that "Presidential Administration" should increase the accountability of agency decision making.<sup>240</sup> Other scholars have neglected the issue of accountability altogether.<sup>241</sup> By recognizing that presidential involvement has a likely *negative* effect on the accountability of agency decision making, my model provides a realistic starting point for review.

By intensifying the appropriate level of review, my model enables courts to highlight both the occurrence of presidential involvement and the reasons motivating it. Relevant-factor analysis requires a relatively high level of scrutiny, especially in the "exceptionally compelling" circumstances of presidential involvement, and this has accountability-promoting implications. In light of the expanded record that such scrutiny implies, the public

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235. *Chevron* review asks whether an agency's decision is substantively reasonable. *See Chevron*, 467 U.S. at 845. Arbitrary and capricious review asks whether an agency's decision is substantively arbitrary and whether the agency followed the correct procedures (e.g., whether it considered relevant factors) in reaching its decision. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416–17 (1971).

236. *See supra* notes 171–172 and accompanying text.

237. *See supra* note 168.

238. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring) (establishing guidelines for determining whether presidential action is constitutionally appropriate).

239. *See supra* notes 36–42 and accompanying text.

240. *See Kagan, supra* note 2, at 2378. In fairness to Kagan, however, she does contend that modifications in the application of *Chevron* deference are necessary to ensure such an increase in accountability. *Id.* at 2376–77.

241. *See supra* Section II.C.

will likely see the president's and the agency's contributions, distinguish them from each other, and hold each entity accountable. Knowing that the appropriateness of their decisions hinges on the courts' ability to discern the true reasons underlying them, moreover, the president and the agency will act transparently in the first instance. Despite its similar potential to increase accountability, Michelle Gilman's *Youngstown* inquiry is less fact-intensive than my model and is more about upholding an abstract separation of powers than upholding statutory intent.<sup>242</sup> The Court's efforts to undermine *Youngstown* stand in contrast to its silence about the use of arbitrary and capricious review, which ostensibly favors my model's application.<sup>243</sup>

My model also addresses the arbitrariness critique of presidential involvement by dispensing with false assumptions, intensifying scrutiny, and focusing on the issue of arbitrariness more explicitly than previously articulated solutions. Dispensing with false assumptions has as many benefits for nonarbitrariness as it does for accountability. The above accountability-promoting implications are ultimately a by-product of arbitrary and capricious review's main purpose: to identify and uphold congressional intent and to maintain the rule of law by limiting the discretion of congressional delegates.<sup>244</sup> Courts first developed arbitrary and capricious review as a solution to the arbitrariness concerns that attended the emergence of the administrative state;<sup>245</sup> these are the same concerns that (a) the presidential control model is noteworthy for ignoring,<sup>246</sup> and (b) provide the basis for the current arbitrariness critique.<sup>247</sup> The requirement that agencies must base decisions on relevant factors provides an applicable rule of law and places it at the forefront of the court's inquiry.<sup>248</sup> It also recognizes the judiciary's presumptive expertise in upholding this rule of law. As Part II noted, the proponents of other solutions have either prevented the judiciary from exercising its *Marbury* role or have appointed less-traditional, less-capable actors in its stead.<sup>249</sup> My model corrects this significant mistake.

## CONCLUSION

The intensification of presidential involvement has sparked decades of debate. But while critics have convincingly identified the need to ensure that agency decisions remain accountable and nonarbitrary, they have not yet presented a compelling means of realizing these goals. This Note argues that

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242. Compare *Youngstown*, 343 U.S. 579 (inquiring generally about the overlap of constitutional powers), with *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (conducting a detailed assessment of each factor that the agency considered).

243. See *supra* notes 100, 168.

244. See *supra* notes 37–42 and accompanying text.

245. See *supra* notes 37–42 and accompanying text.

246. See *supra* notes 113–115 and accompanying text.

247. See *supra* Section II.B.

248. See *supra* notes 37–42 and accompanying text.

249. See *supra* notes 173–175 and accompanying text.

arbitrary and capricious review is the best means of addressing the accountability and arbitrariness critiques of presidential involvement. As this Note demonstrates, arbitrary and capricious review is applicable in all situations of presidential involvement. It puts the existing scholarship to work by encouraging a new focus on the holder of directive authority. In turn, this new focus resolves the problems of nonaccountability and arbitrariness by tackling false assumptions about the nature of presidential involvement and by heightening judicial scrutiny. Unlike previously suggested solutions, arbitrary and capricious review also puts courts in their properly active capacity by requiring them to discern and uphold statutory intent. As presidential involvement continues to escalate, the judiciary should adjust its practice and apply this underappreciated doctrine to full effect.